HINDU LAW;

PRINCIPALLY

WITH REFERENCE TO SUCH PORTIONS OF IT

AS CONCERN

THE ADMINISTRATION OF JUSTICE,

IN THE

KING'S COURTS,

IN

India.

By SIR THOMAS STRANGE,

LATE CHIEF JUSTICE OF MADRAS.

VOL. II.

Omnes, (*civitates*,) suis legibus et judiciis usæ, αὐτονομίαν adeptæ, reviviscunt. Cic. Ep. ad Attic. c. vi. ep. 11.

Let him (the king) establish the laws of the conquered nation, as declared in their books. Menu, ch. vii. v. 203.

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1830.

RESPONSA PRUDENTÛM;

OR,

OPINIONS OF PUNDITS

ATTACHED TO THE COURTS ESTABLISHED THROUGHOUT
THE INTERIOR OF

THE TERRITORIES DEPENDANT UPON THE GOVERNMENT OF

Madras:

WITH OTHER ORIGINAL PAPERS,

AS

PREPARED AND ARRANGED FOR THE PRECEDING WORK.

Mirabile est, cum plurimum in *faciendo* intersit, inter doctum et rudem,
quam non multum in *judicando*.—CIC. de Orator. iii. 24.

PREFACE.

In this revised Edition of the present Work, care has been taken, in settling the references between the two volumes; *i. e.* between the Work, and its Appendix.

In general, the cases in the Appendix are distributed according to the chapters of the Work, and in the order of reference.

Turning, however, often upon different points, and being for the most part printed entire, the reference to such is sometimes to a part of the Appendix, not corresponding to the part of the Work from which it is made. This happens however in but few instances, and might have been altogether avoided, had it occurred in time to have broken the cases alluded to into parts, distributing particular parts, according to the order of the Work. The difference, in the actual state of the Appendix, is not great, and does not affect the utility of the Work.

There is added an Index of native *terms*. As to *subjects*, the Index to the first volume is, in effect, one to the Appendix, to which the pages of the first volume constantly refer.

It would ill become the author, introducing his Work as the "only one of the kind existing in the English language,"* to continue to do so, after possessing a copy of a quarto volume, entitled "Considerations on the Hindoo Law, as it is current in Bengal. By the Hon. Sir Francis Workman Macnaghtan, Knt.;" purporting to have been

* See vol. i. p. 10.

printed at the Mission Press, at Serampore, in 1824. The author of the present Work first published his in 1825, having been occupied upon it, at intervals, for years before. Thus it appears that he and his colleague on the Madras Bench, must have been employed on the same subject, at or about the same time;—unconscious, in point of fact, of each other's design. The author of the present Work had none on his part, till long after its publication. The moment he heard of the Serampore publication, he took every means in his power to possess hmself of a copy; by inquiries in every direction at home, as well as by writing repeatedly for one to friends in India. Among these, in particular, was David Hill, Esq. Chief Secretary to the Madras Government, and son-in-law to the author of the "Considerations." Sufficient be it to say, that his inquiries and solicitations were as fruitless, as they were earnest. They could not but be earnest, considering the object it would have been to him to have had before him, in preparing the present Edition of his own Work, the authentic means the work in question was likely to afford him, of comparing, and contrasting the doctrines of the different schools of Hindu law; constituting, as these do, the greatest difficulty in composing a treatise on the subject. How they happened to be so fruitless, remains to be accounted for. The work from Serampore does not appear to have been for sale in this country. It could be traced to no private hand; and it was inquired for in vain at the India House. It is more difficult to imagine how the endeavours that were used were equally unsuccessful in India. In the following way only can the author of the present Work account for the circumstance.

In 1801, being then Recorder of Madras, he had, in the discharge of his duty, as such, to deliver a judgment,

in a suit between Hindoos, turning upon the legality, under the Hindu law, of a particular adoption. The subject was new to him; he was unassisted in investigating it; and the lights, by which he had to find his way to a legitimate conclusion, were comparatively scanty, as may appear by the reference made to it, in the present Work.(1) It bristled moreover with points. A note, published by him, among other notes of the kind, on his quitting his seat on the Madras Bench, sufficiently shews the pains at least taken by him, in forming the one at which he arrived. This judgment, the author of "Considerations," &c. takes occasion to examine, in the work alluded to.—That the tone, in which that examination is conducted, may have led common friends rather to withhold the book containing it, is not altogether improbable. And what is, if any thing, confirmatory of this; a copy of it has at length reached him, within a very recent period only, addressed to him at his bankers' in town, he knows not by whom, and has no means of ascertaining.

Without seeking to defend the judgment that has been arraigned, it must not be forgotten, that the law of adoption at Bengal (to which the work entitled "Considerations," &c. is confined) differs from the law on the same subject at Madras;—nor can any one have perused the chapter upon it, in the present Work, without being struck with its uncertainty in general.—We have for this, indeed, the acknowledgment of the learned examiner himself, who takes for the motto to his book,

"Misera servitus, ubi jus est vagum, aut incertum."

It is moreover consoling, to him whom it concerns, under the ordeal to which his judgment, as Recorder of

(1) See vol. i. p. 102.

Madras, has, by a brother Judge, been subjected, that it was acquiesced in by parties deeply interested to have disputed it, and habitually litigious;—that it remained unappealed from by them, possessing competent advice;—the matter in dispute amounting in value to between two and three hundred thousand pagodas, (or above 100,000*l.* sterling)—where appeals were pretty much the order of the day, in a Court then but recently instituted, and under the direction of a single Judge.

Contemplating the censure of it, on the part of the learned person alluded to, in this point of view, though it be not meant to characterize his weapon as—*telum imbelle;* (on the contrary, his pen is sufficiently caustic;) it is, in this instance, however, for the reasons given,—*sine ictu.*

With regard to the work in general, ("Considerations on Hindoo Law," &c.) it is, from its having come so recently into his hands, impossible for the author of the present, to avail himself of it, at this moment, with reference to his own. But it is his intention to lose no time in perusing it with care; and, according as his examination of it shall lead to the correction of errors, in the publication now passing, on his part, through the press, he shall feel it his duty to communicate the result, in a detached form;—having long since learnt that—*fas est et ab hoste doceri.*

T. A. S.

Bath, Jan. 1, 1830.

APPENDIX.

NOTE.

The initials C. E. and S. annexed to the "Remarks," in the following Appendix, denote respectively the names of Mr. Colebrooke, the late Mr. Ellis of Madras, and Mr. Sutherland of Bengal.

HINDU LAW.

APPENDIX TO CHAP. I.

ON PROPERTY.

ZILLA OF VERDACHELLUM.

March 14, 1810.

Teroovandeporam Chrishnamachariar,
By his Vakeel, Seshadru Jyengar,

v.

Alamalamman,
By his Vakeel, Syed Kussanooden Cawn.

(Ante, vol. i. p. 18. 21. 258.)

We send you copy of the genealogical table in this cause; and you will let us know which of the parties is to be considered as heir. If the proprietor of a property authorize another to take possession of it, and perform his funeral ceremonies after his death, and die, leaving an heir at law, is the latter thereby disinherited?

Answer of the Pundit.

The gift by the owner in his lifetime was competent; and takes effect upon his death.

Remarks.

This is a consequence of the power of *giving;* which is not restrained, unless in the case of land, the owner having male issue living; or in that of the whole property, leaving the family thereby destitute. Jagannatha's Digest, book ii. ch. iv. ver. 4, 5. 7. 9. 14. 16. According to the *Smriti-Sara,* cited by Jagannatha, (vol. ii. p. 118.) a gift of the whole estate is valid, but sinful. In the case of land, however, the gift would be invalid, if the heir were a lineal male descendant, and did not consent. Mit. on Inh. ch. 1. sect. 1. § 27. C.

ZILLA OF CAMRA.

May 3, 1810.

(Ante, vol. i. p. 19.)

1. If a patrimonial estate in land be to be disposed of, as *danum*, or gift to any one, can the whole of it be so parted with, without the consent of the wife of the donor, or reservation to her of any share?

2. Will the conveyance be good, by way of assignment in trust, in the absence of the donee?

3. Will it be good, if the gift consist in the donor at his death, saying, "You will take the whole of my effects, together with my debts?"

Answer.

1. The wife should consent; and some land should be given her, sufficient for her maintenance.

2. Though the donee were not present, if the donor freely, and with gold, and pouring of water, give before witnesses, it will be according to Sastra.

3. It will not.

Remarks.

1. The gift by the owner would not be invalid, though made without his wife's consent.

2. No doubt, a gift may be made to an absent person. See passage cited in notes to Jimúta Váhana, ch. i. § 22. And, concerning the delivery of gold, Mit. on Inh. ch. i. sect. 1. § 31.

3. It wants the formalities of a gift. C.

ZILLA OF CUDDAPAH.

Nacharummah and Another,

v.

Sashummah and Another.

(Ante, vol. i. p. 21.)

The deceased Venganah, besides his son Singree, left surviving him the defendant Sashummah his wife, a daughter, two daughters-in-law, and a fraternal sister-in-law,—all widows. In his last illness, he directed that after his death, a certain sum, with his accounts and bonds being first given to his son, the residue of his property should be divided equally between him and the five widows. This was accordingly done; and the son having since died, the two daughters-in-law, above alluded to, claim to be entitled to share what he has left, as against the defendant Sashummah, the mother of Singree deceased. Qu. as to their right?

Answer.

The deceased Venganah, having a son, had no right to make the distribution stated.

The opinion proceeding to enumerate in order the persons successively entitled by law to inherit to Singree, concludes that, in the actual state of the family, the defendant, the mother of Singree, and not the parties claiming, is entitled to succeed to Singree's share of what his father Venganah left.

Remarks.

By law, as received in the school that follows the *Mitácsharà*, *Smriti-Chandricà*, and *Mádhavya*, a father is restrained from giving away *immoveables*, without the concurrence of his sons: but he is not precluded from disposing of *moveables* at his discretion. (Mit. on Inh. ch. i. sect. 1. 27.) Considered then as a gift, the distribution alluded to, which seems not to have concerned land, should not have been deemed invalid. No doubt, the mother (and not the sisters-in-law) was entitled to succeed to the son's property. C.

The answer is no doubt correct as it applies, Whether Venganah had or had not a right to make the disposition he did? having been made, the question to be decided is, Who succeeds to Singree? for the previous distribution is not *sub judice*. The preference of the mother is probably correct. E.

ZILLA OF SARUN.

(A) Ram Tuwukbl Tievaree	}	*Appellants.*
(B) Lal Ram Tievaree		

v.

(C) Four sons of Chutur Tievaree	}	*Respondents.*
(D) Ico Lal Tievaree		

(Ante, vol. i. p. 18.)

Raggoo Nath, deceased, was the father of A, C, and D. A is the father of B. It appears that C and D having instituted in the Zilla of Sarun a suit against A and B, claiming certain lands on the ground of their having been assigned to A, by a deed in writing by their father Raggoo Nath, contrary to the Shastre, obtained a decree in their favour by the decision of the Registrar, which was confirmed in appeal by the assistant judge. The appeal of A and B to the Provincial Court not being admitted, they petitioned the Sudder Dewanny Adawlut for a special appeal; upon which that Court referred to their Hindu law officers the following questions, arising from the case as above stated, with the pleas urged by the appellants.

1. Supposing Raggoo Nath to have acquired the lands in dispute by means of ancestral property, could he, in that case, assign them by deed to one of his sons, to the exclusion of the others?

2. Supposing them to have been not ancestral, but of his own acquisition, could he do so?

In answer, the Pundits replied;

That, under the circumstances stated, the father, in either case, was not competent to assign over, by any means, the lands in question to one son, without the consent of the others; a father not having power either to give or sell without the consent of his sons, whether land or slaves, though acquired by himself, much less where they have descended to him. And for this they referred to the text of Menu, cited in the *Mitacshara*, *Vyavahara Madhavya*, *Vira Mitsodaya*, *Vivada Tandava*, *&c. &c.*

Communicated by Mr. Sutherland.

ZILLA OF GANJAM.

Sept. 5, 1805.

(Ante, vol. i. p. 21. 26.)

A Brahmin having separated himself from his family above sixty years ago, made a formal division with his brothers; and, having no male issue, gave his *meerass*, or right of conducting the religious ceremonies in the houses of a certain class of people, to his son-in-law, and died. His nephews and other relations having put in their claims, who is entitled to it according to the Hindu law?

Answer.

The gift to the son-in-law is valid, provided it was made with the consent of the giver's wife; or, if he had none, of his mother, grandmother, or other relations whom it was his duty to maintain, subject to there having been other property remaining sufficient for their support. The owner may dispose of his property as he pleases, first setting apart enough for the maintenance of his family.

Remarks.

The necessity of every one to provide for the maintenance of his family, and their consequent right to a sufficiency for that purpose, is generally admitted. The concluding part of this opinion is however too vague;

in fact, it is not the case universally, that the owner may dispose of his property as he pleases. *An individual cannot alien his real estate, to the prejudice of his heirs.* With respect to the case proposed, I agree with my Pundit that the gift was invalid; though he thinks the son-in-law, during his wife's life, might, as her representative, have enjoyed the right conferred. "*Pamohitya*" is the technical name of the object of the gift. Of this, three descriptions are recognized. 1. The "*Kramagata,*" or ancestral. 2. "*Swayankuta,*" or self-acquired. 3. "*Agantuka,*" or temporary. The two former are regarded as "*Vrilti,*" subsistence; and, by custom, considered as analogous to real property. The last is merely incidental. From the term "*meerass,*" used in the statement of the case, (being an Arabic word, signifying *heritage,*) it would appear that the disputed *Pamohitya* was of the first description abovementioned; in which case, there can be no doubt but that the gift was not valid against the nephews of the donor. S.

ZILLA OF VIZAGAPATAM.

December 17, 1808.

(Ante, vol. i. p. 23.)

The family of the deceased, a Hindoo of the Banyan tribe, consisted of his wife and the widows of two sons dead without leaving issue; when, being at the point of death, he caused to be drawn two instruments under two several dates, purporting, that nothing should be given to his elder daughter-in-law, except the jewels she had worn during the life of her husband; but that the younger one should have some of the moveables, beside her ornaments; and that all the rest of his property, moveable and immoveable, should belong, in certain specified proportions, to his blood relations, his servants, and his widow.—Are these instruments valid? And, if not, in what manner are the three widows, *i. e.* the widow of the deceased, and his two daughters-in-law, living together, to divide the estate?

Answer.

The Pundit, protesting against acts done under the influence of prejudice or resentment, proceeded to say, that, subject to the instruments, the control of the whole, in default of male issue, devolves on the widow of the deceased; and there is no authority for dividing the property between her and the daughters-in-law, without her consent. If she consent to a division, it should

be into four parts; of which she should take two, and the two daughters-in-law one each.

(Signed) DUSKY NARRAIN, *Sastree*.

Remarks.

A disposition of property made under the influence of anger, as of any other violent passion, disturbing the intellect, is by law invalid. But the objection must appear from other circumstances than the mere fact of the disposition being different from that which the law would have made without it. The whole property in question was vested in the father, and he, having no surviving male issue, was not restricted by law from disposing of immoveables, as well as moveables, at his discretion. Whatever was not so given away by him would devolve by inheritance on his widow, and, after her death, on his legal heirs; and, according to an opinion which is supported by the author of the *Veijayanti*, a commentary on Vishnu, the widows of sons, who died before their father, are entitled to succeed to him. But this doctrine, on which alone the daughters-in-law could found any pretensions to participate, is not generally received in the schools which follow the *Mitacshara*, C.—See Append. to ch. vi. On Inheritance.

Mr. Ellis, in a remark reflecting with considerable freedom on the Pundit in this case, was of opinion that the widow of the father was the heir, and that the disposition of the deceased was of no validity.

ZILLA OF GANJAM.

(Ante, vol. i. p. 21.)

A Brahmin having some landed property, gave it to his paternal nephews, who had been divided from the family; and died, leaving his widow, and a widowed daughter-in-law, surviving him.—Qu. was the gift competent, according to the Hindu law?

Answer.

It is defective, in not having allotted a part for the maintenance of the women; a gift by a man, leaving his family destitute, being strictly forbidden.

Remark.

In this case, the Brahmin had no male issue living; and, supposing provision to have been made for his widow, and daughter-in-law, the gift to the nephews was probably valid, though the wife was the heir at law. S.

ZILLA OF GANJAM.

(Ante, vol. i. p. 21.)

A Brahmin having a son, and a grandson by another son deceased, a few days before his death, drew out a paper in the name of *Sree Veneataswaraloo,* (the god worshipped at *Tripetty,)* stating, that the whole of his property being divided into four parts, two of them should be retained by himself, one belong to his son, and the remaining one to his grandson, the representative of his elder son deceased; the two latter to enjoy their shares during their respective lives, the same after their deaths to vest severally in their widows. Signed by the parties, it was attested by witnesses. Nevertheless, the son subsequently, before the death of his father, objected to the disposition. Since the death of the father, the widow of the latter having brought a suit to recover the shares reserved by her husband under the writing referred to, you are to say whether it be valid, and she entitled under it to the shares in question? Or, whether she is entitled to be maintained only; and, if so, how much is to be paid her annually out of the property for her maintenance?

Answer.

The writing alluded to is inconsistent with the Hindu law, according to which the estate of the father can never be inherited by another, while there are sons. The widow, therefore, must be content with maintenance,

which should be an annual allowance, suitable to her rank and condition.

Remark.

The deed in question does not appear necessarily inconsistent with the Hindu law. The only part that seems liable to future objection, is that which stipulates the reversion of the shares of the son and grandson to their widows. This would be invalid and void, so far as it went to affect real property, if the son or grandson left an heir preferable to their widows. As the case is stated, I do not understand that the writing contained any condition that the two shares reserved by the Brahmin shall survive to his widow. Did it, I conceive that it would be valid as against the son and grandson who voluntarily signed it; though not as against any other preferable heir to the widow, so far as real property might be concerned. So that, during their lives, the widow would be entitled to their interest in it, and no longer; unless it continued to her by operation of law.

S.

ZILLA OF COMBACONUM.

September 10, 1808.

(Ante, vol. i. p. 26.)

The deceased, having sons and daughters, in his lifetime divided his estate with his sons, giving to his wife a portion of land, for her life.—Was the latter gift valid?

Answer.

It was.

Remark.

Land may be given by the husband to his wife in *Stridhana*, and *will be her absolute property*.(1) The gift in question, however, appears to have been for life, and seems to be merely an allotment for maintenance, in which case too it is doubtless valid, and the land will be at the son's disposal, after the widow's death. C.

(1) Vide infra, p. 21.

ZILLA OF CHINGLEPUT.

October 15, 1803.

(Ante, vol. i. p. 26.)

A man having assigned, as part of a portion for his daughter, a female *Pariah* belonging to him, is the as signment, which is in writing, good?

Answer.

If the woman come within one of the five descriptions of slaves, that are not to be emancipated, the portion, partaking of the six essential qualities of *Stridhana*, will be good in law.

(Signed)
T. KISTNAMA CHARIAR, *Pundit.*

Remark.

There is nothing in the law to prevent a slave being given, like any other property, as a nuptial present. C.

A native of Bengal (Hindoo) having lost the sons that he had by his first wife, in order to reconcile her to his purpose of taking a second, settled some houses and grounds upon her, but without giving possession of them; to obtain which, she brought an ejectment against him in the Supreme Court; which the Pundits of the Court considered to be maintainable, upon the ground of its being *Stridhana*, which it was illegal for any one to withhold; reporting, at the same time, that her dominion over real property, derived from her husband, consisted in enjoyment, and did not extend to alienation.

Remark.

The opinions delivered by the Pundits in this case appear conformable to the doctrine received in Bengal. *A wife may not aliene, as she pleases, her real "peculiar property" (Stridhana) bestowed by her husband;*(1) but I imagine she is absolute with respect to such property, derived from any other quarter. Jim. Vah. ch. iv. sec. 1. § 23. What precedes is applicable to the doctrine of the Bengal school. According to the Benares, and Mithila authorities, the restriction upon her as to real property is general. S.

(1) Vid. supra, p. 19.

ZILLA OF VIZAGAPATAM.

January 23, 1810.

(Ante, vol. i. p. 27.)

A husband, surviving his wife, died, eaving only a daughter, who succeeding to his property, which was in land, her husband took upon him by writing, to dispose of a part of it to a Brahmin, the wife objecting at the time to the alienation. The granter having, in consequence of this opposition, got back the deed, the Brahmin brought his action to recover the land, insisting on his right under the grant. On reference to the Pundit of the Court, he is of opinion that the right of the daughter to succeed was clear: and that the husband had no power to dispose of any part of the land so descended, withou her consent.

Remark.

Here the married daughter inherited in default of male issue, widow, or unmarried daughter.—Mitacsh. on Inh. ch. ii. sect. 2, 3, &c. Her husband was precluded from using his wife's property, unless for the performance of some indispensable duty, or in circumstances of distress.—Ibid. sect. xi. 32. C.

ZILLA OF BELLARI.

July 23, 1808.

Hammuckah, *v.* Rungapah.

(Ante, vol. i. p. 27.)

The Defendant states, that toward payment of the money adjudged due from him to the Plaintiff, by the decree of the Court, his only property consists in the ornaments worn by his wife, who is yet but seven years of age. Are they liable to be seized in this case, in execution for the debt in question?

Answer.

It appears from Catyayana, that a husband cannot appropriate jewels given to his bride, even for his necessary maintenance; and the judgment recovered by the Plaintiff, must be satisfied by other means.

Remarks.

The answer supposes the ornaments to be the wife's property (*Stridhana*), given to her outright; but the question leaves it dubious whether they might not be the husband's, and only allotted to her for wear. In distress, the husband may for his relief, take his wife's separate property (*Stridhana*)—Mitacsh. on Inh. ch. ii. sect. xi. § 31.—But he is not compellable by a creditor to do so; in other words, the creditor cannot seize the wife's goods in execution for the husband's debt.

C.

One of the circumstances, under which the husband may take the *woman's property* of his wife is, "under "arrest." The creditor indeed could not seize the jewels in possession of the wife, and forming her *Stridhana;* but he might have arrested the husband, who might then have legally appropriated them to the payment of his debt. E.

ZILLA OF CHINGLEPUT.

May 31, 1803.

(Ante, vol. i. p. 33.)

On reference to the Pundit, as to the form and effect of a deed of *Stridhana*, he certified in substance as follows:

Answer.

Stridhana means an estate given to a woman. In a deed conferring it, the year and month should be mentioned, with words to the effect following:—" I give "you so much out of my estate as *Mungale Drauya*, " or matrimonial portion; (literally, ceremony money;) " and you are to enjoy it as your own." The property so given descends from her to her daughter; if she have no daughter, to her son.

(Signed) T. Kistnama Chariar.

Remark.

This is deduced from general maxims concerning the form of a solemn deed. Given to her by her kinsman at her marriage, or before, or subsequently to it, the property is her *Stridhana*. See Mitacsh. on Inh. ch. ii. sect. xi.—For succession to it after her death, see Id. sect. xi. 11, 12, et seq.

The Pundit (in a case missing) reported, that if a man having been in possession of the land of another for *twenty* years, the owner, living in the same village, in all that time, make no claim, it becomes the property of the occupier; and, on the same principle, if one have been allowed to retain, undemanded, another's money for *ten* years, the lender living all the time in the same village, it is irrecoverable.

Remarks.

See Jagannatha's Dig. b. 1. cxiii. C.

This is not the law, according to authorities in this (the Southern) part of India, Vijnyaneswara, after a long argument, rules, that it is the *perishable produce* only of land that cannot be recovered after the expiration of *twenty*, and of other property after *ten* years, such land, or other property, having been enjoyed to the exclusion of the owners, by his default, or in his view. With regard to *land*, he holds that, if *legal acquisition* can be disproved, even after the expiration of a hundred years, (considered as the measure of the life of man,) ownership is not established by possession; and he accordingly declares, that "even beyond the period of "memory, if there exists a current tradition of the *illegality* "*of the acquisition*, the enjoyment is not valid." And it is observable, that, to render it so in any case, it must have been in view of the owner. In fact, according to the original and correct doctrine of the Hindu law, enjoyment or possession can never be cause of

ownership, it is a presumption of it only; but, if the want of original title can be shewn, the possessory holder may, *at any time*, be divested of the property. This applies not merely to land, but to property of every description. The Hindu canon is, "Acquisition "must be shewn;" all else is exception. Menu says, "He who enjoys without ownership for many hundreds "of years, the Lord of the earth shall inflict on that "criminal the punishment ordained for thieves." E.

APPENDIX TO CHAP. II.

ON MARRIAGE.

BOMBAY.

Broach.—Court of Adawlut, Jan. 25, 1812.

(Ante, vol. i. p. 36.)

Upon the case referred, and consideration of the law, it appears to us, that the right of "*Wagdan*," or betrothing a girl, and of marrying her after, belongs, in the first instance, to the father; if he be not living, then to the paternal grandfather; failing him, to the brother of the girl; if she have no brother, to her paternal uncle; in default of such relation, to her male cousins on the same side; and, ultimately, to her mother. In the present case, the girl's paternal uncle has the right.—Referring to a text in the *Mitacshara*.

(Signed) NURBHUYRAM, *Sastree.*
WALUBHRAM, *Sastree.*

Remark.

The passage in the *Mitacshara* is part of Yajnyawalcya's text (part i.)—"The father, paternal grand-"father, brother, kinsman, remote relations, (*saculya*,) "and mother, are the persons to give away a damsel; "the latter respectively, on failure of the preceding."

C.

ZILLA OF CHINGLEPUT.

May 31, 1803.

(Ante, vol. i. p. 29.)

(1) On reference to the Pundit, as to the form and effect of a deed of *Stridhana*, he certified in substance as follows:

Answer.

Stridhana means an estate given to a woman. In a deed conferring it, the year and month should be mentioned, with words to the effect following:—"I give "you so much out of my estate as *Mungale Drauya*, "or matrimonial portion (literally, ceremony money); "and you are to enjoy it as your own." The property so given descends from her to her daughter; if she have no daughter, to her son.

(Signed) T. KISTNAMA CHARIAR.

Remark.

This is deduced from general maxims concerning the form of a solemn deed. Given to her by her kinsman at her marriage, or before, or subsequently to it, the property is her *Stridhana*. See Mitacsh. on Inh. ch. ii. sect. 11.—For succession to it after her death, see Id. sect. xi. 11, 12, et seq. C.

(1) Misplaced:—belonging to the preceding chapter.

ZILLA OF VERDACHELLUM.

Narasummall, *v.* Ragavendrachoree.

Nov. 24, 1809.

(Ante, vol. i. p. 36.)

A son refuses to maintain his mother, alleging that, without his consent, she married off two of her daughters, receiving at the time a certain sum from each of their respective husbands.—1. Does this exonerate him from the obligation of maintenance?—2. Is she entitled to retain money so received?

Answer.

The son's obligation of maintenance is not discharged by what is stated, neither can he call his mother to account for the money in question received by her, provided it were given to her for her own use.

Remarks.

The brother of the girls, not the mother, had the right to give them in marriage. But she does not forfeit her maintenance by that assumption of the son's privilege.—As to the receipt of money for giving a damsel in marriage, it is reprobated by Menu, ch. ix. ver. 98, and 100. Being a present voluntarily given to the mother, it cannot be claimed by her son, nor set off against her maintenance. He had no right to any gra-

tuity for the marriage of his sisters, and therefore cannot claim it as his due. C.

The mother had no right to marry the daughters without the consent of her son, under whose protection she and they were; but he ought to have prevented it at the time. E.

MADRAS.

Sudder Dewanny Adawlut.

(Ante, vol. i. p. 29. 33.)

A Hindoo, employed in the army, dies, leaving at his death a betrothed wife, with whom consummation had not taken place; together with concubines, and both adopted and illegitimate children; and, with respect to property, a pension payable to his heirs.—Who are, in this case, his heirs?

Answer.

(1) The adopted children are entitled to the pension, subject to the obligation of maintaining the concubines. It is so held in *Vivandabhangarnava*, "on partition of "patrimony." But it is not said that women with whom marriage has not been consummated, and illegitimate children, have any claim to inherit.

(Signed) VENCATASA, *Sastree.*

Remark.

If what is here called *betrothment* be the first, or real marriage (for the fetching home of the bride at the age of puberty, commonly called the second marriage, is merely the solemnization, not the celebration of the rite) —the woman cannot be married again,(2) (except in

(1) Vid. post, p. 85.—S. C.

(2) In a late case before the Sudder Dewanny Adawlut, of Madras, where a marriage had been interrupted by the death of the husband, subsequent to betrothment, and before consummation; the young woman who survived, claimed to inherit to the deceased as his widow; or to be entitled at least to maintenance out of his assets. But the suit was compromissal. Vencataram v. Venestasoobormell. Fourth Term, 1824.

some castes, where custom supersedes the law)—and, as I know of no distinction made by the Hindu priests between consummation and non-consummation, she is, in my opinion, entitled to be considered in every respect as a wife. E.

BOMBAY.

Broach.—Court of Adawlut, Sept. 6, 1811.

(Ante, vol. i. p. 29. 36.)

In the case of Kubyan, who first betrothed his daughter to Pranwulub, the brother of Ruseek, and afterwards to Vesoor, on complaint, the custom of the caste having been ascertained, by assembling witnesses from Broach, Oklesum, and Hansit, it appears, that where the first betrothment has been accompanied with presents, it is conclusive; and it appearing in this case that the one in question was accompanied by the delivery of a sum of money, as part of the *Pulla*, or bridal presents, we are of opinion that, as well according to the custom of the castes, as the law, the first betrothment ought to be established, and have its effect; it being ordained in the *Mitacshara*, that a girl shall only be betrothed once, unless the betrothment that has taken place, be liable to be revoked for sufficient reasons, such as disease, bad conduct in the man, and the like.

(Signed) NURBHUYRAM, *Sastree.*
WULUBHRAM, *Sastree.*

Remark.

See passages cited by Jagannatha, book iv. ver. 180. also, ver. 176, and 178. C.

BOMBAY.

Broach.—Court of Adawlut.

(Ante, vol. i. p. 36.)

The father in this case having betrothed his daughter, in consideration of a sum of money stipulated, the betrothment is *Asaor Viva;* and, on payment of the money, it cannot be set aside;—otherwise, it may.

Remark.

See Jagannatha's Digest, book v. ver. 499. 3. Menu, ch. iii. ver. 31. and *Mitacsh.* ch. i. sect. 4. 6. There is no special provision in the law for the case of a promise to contract an *Asura* marriage. The tenour of the agreement must determine, whether, under the breach of such promise, the stipulated sum is to be recovered, or a compensation. C.

BOMBAY.

Broach.—Court of Adawlut.

(Ante, vol. i.—p. 38.)

The betrothment in question cannot stand, the *Mitacshara* declaring that those only whose *gotra* are not the same may be betrothed to each other. And whatever bridal presents may have been given by the boy's father or family to the father or family of the girl, must be returned.

(Signed) NURBHUYRAM, *Sastree.*

Remark.

See Menu, ch. iii. ver. 5. C.

ZILLA OF COMBACONUM.

(Ante, vol. i. p. 38.)

1. A man having engaged a young girl as wife to his son, if, on his way to fix a prosperous hour for the wedding, he should meet one carrying a pot with fire in it, a single Brahmin, or a cat, are these signs, on account of which the marriage should be stopped ?

2. If stopped, is the present given by him to be returned, notwithstanding the preparations made for its celebration ?

Answer.

The marriage under such circumstances should be stopped, and the presents be returned. Of the preparations, what is saleable should be sold; for the rest, there should be an allowance.

(Signed) P. VENCOO, *Sastree.*

Remark.

The auspices being bad, the parties would of course, conformably with Indian notions and prejudices, abstain from proceeding further, toward effecting the intended marriage. Presents made in contemplation of it must certainly be returned. C.

ZILLA OF CUDDAPAH.

Chingleroyalo, *v.* Venertaroyalo.

(Ante, vol. i. p. 38.)

Can a promise by one to give his daughter in marriage to a particular person, be enforced in law, and how?

Answer.

The match being a suitable one, and the Defendant having received from the Plaintiff a sum of money, toward the expense of the marriage, on refusal of the Defendant, the magistrate should send for the father of the girl, and make him perform his contract. If he persist in refusing, he is liable to be punished by fine, and otherwise.

Remark.

See Menu, cited by Jagannatha, book iv. ver. 171. But for sufficient cause, the promise may be retracted. Id. ver. 178. E.

ZILLA OF CHINGLEPUT.

June 30, 1806.

(Ante, vol. i. p. 172.)

Upon complaint of a woman against her husband, claiming food and raiment, he accused her of adultery. Upon examination, one of the witnesses took his oath both in the Court, and in the Pagoda, that at an assembly of all their relatives, on being charged, she confessed the fact. Another swore in like manner, that he had heard her admit as much; and a third witness deposed that he heard the first tell his relations what she had confessed. It was further proved that she had been seen going with a herdsman, and that she had remained with him for a considerable time out of the village. Assuming her guilt, is her claim maintainable?

Answer.

The Pundit, reciting all the circumstances, reported that the husband was not compellable to provide such a woman even with food and raiment; and that she was liable to be repudiated by him, in the presence of their relations; referring to Menu.

(Signed) TERUMALY KISTNAMA CHARIAR.

Remark.

Menu nowhere says, that a woman divorced is not entitled to a maintenance. She is to be "abandoned," deprived of nuptial rites; she is to be divested of her ornaments, and separate property; but she must be maintained: as must an outcast be by his family. E.

ZILLA OF MADURA.

(Ante, vol. i. p. 46.)

If a married woman quit her husband, and elope with another, is the latter answerable to him for the loss of her society?

Answer.

He is not.

(Signed)

SASHADRY TYENGAR.

Remarks.

The law prescribes punishment for adultery; not pecuniary reparation to the husband for the loss of his wife's society. C.

Answerable to him pecuniarly?

No:—It is by the Hindu law a criminal offence, and punishable, as such, both in the man and the woman.

E.

ZILLA OF VIZAGAPATAM.

(Ante, vol. i. p. 46.)

1. Is an action maintainable by the husband, to re cover against the adulterer damages for criminal conversation with his wife? 2. What is eventually the measure of such damages?

Answer.

The husband, in the case in question, has a claim to be reimbursed by the adulterer the expenses of the *Gata-Sraadum*, and of the ceremonies attending his marriage; and, if desirous of another wife, a right to recover those also of a second marriage—to be computed according to the custom of the country, the times, his caste, and any special circumstances.—Citing Menu, and a number of other books.

(Signed) NARAYANA.

Remarks.

If the books cited contain passages that support this opinion, I have not been successful in searching for them. At the beginning of the answer, reference is made to prevailing customs, on which probably it is founded, rather than on express provisions of the law.

C.

Narayana says, it is in conformity with Menu, &c. And, no doubt, in equity, the payment of the marriage

expenses of the husband, deprived of his wife by the seducer, cannot be condemned; but I know not that it is any where prescribed by law. The punishment for every species of adulterous intercourse is most minutely laid down; and the act is, in all its bearings, considered solely as a criminal offence. E.

ZILLA OF VERDACHELLUM.

January 10, 1812.

Tonda Moontee, *v.* Soobban.

(Ante, vol. i. p. 46.)

The Plaintiff having brought his action to recover of the Defendant damages for a criminal conversation with his wife; it was referred to the Pundit of the Court to say, whether, to sustain it, it was necessary to have direct proof of the fact, or if it might be collected from circumstances. The Pundit, premising that the injury was not actionable, but punishable by fine or penance, said, there was no necessity for an eye-witness of the crime complained of; for that, if a man should use equivocal expressions to another's wife, or laugh with her, and ogle, or eye her with amorous looks, or if he should hold conversation with her in such a place, or at such a time, where, or when he ought not to have been speaking with her;—any instance of this sort is to be regarded as a crime in the first, or lowest degree. Or, if a man, with the view of seducing the wife of another, should send her fragrant sandal powder, or flowers, such as jessamine, &c. or perfumes, or jewels, or wearing apparel, or edible fruits; if any of these circumstances be proved against him, it is a crime in the second, or middle degree. If a woman and a man should meet in a secret place, or should embrace one another, or if they should sit together on a bed, or re-

main together in a dark place, or if he should converse with her, handling her hair at the time amorously, or should wound her breast with his nails, or her lips with his teeth, or untie the knot of her cloth, or,—— if any of these circumstances should be proved, the crime imputed is to be inferred.

Remark.

The Pundit is right in his opinion, that damages cannot be recovered for adultery; and the Court ought not to have proceeded in the cause, it being one of those cases of caste and family rights, in which the full operation of the Hindu law is admitted by the regulations. The circumstantial proofs, specially allowed by the law in cases of adultery, are very correctly enumerated. E.

ZILLA OF CUDDAPAH.

Pullen Sitty Nagoo,

v.

Siddanatum Kristnadoo.

(Ante, vol. i. p. 46. 54.)

In this case there is referred to the Sastree, a petition, an answer, a reply, and a rejoinder; and an answer is required from him on the subject, agreeable to *Dherma Sastra*.

Answer.

On the face of the petition, the petitioner is irreproachable; on that of the answer, she appears guilty of a great crime. But her misconduct ought to be proved by witnesses; and, if proved, she should then, and not before, be dealt with as an adulteress. And, should the husband fail in his proof, he will have incurred the penalty of having forsaken a chaste wife; and she will be entitled to a third of his estate.

Remark.

The desertion of a chaste, unoffending wife, subjects the husband to the obligation of maintenance, assigning to her for that purpose a third of what he possesses. See Jagannatha, book iv. ver. 72. He is even liable to the punishment of a thief, according to the *Smriti Chandrica*. C.

ZILLA OF CHINGLEPUT.

Aug. 22, 1803.

(Ante, vol. i. p. 46.)

A married man having connected himself with another woman, his wife quitted him, and returned to her father's house. Her father would have sent her back, but she refused to go. Under these circumstances, can the husband maintain an action against the father, for the expenses of the marriage?

Answer.

Under the circumstances stated (presuming the parties to be *Sudras*), the father will be answerable to the husband in damages for his daughter's contumacy; and if, thus living apart from her husband, any of her caste have connexion with her, the adulterer incurs a fine, as well as the expenses of the marriage. It is so held in the *Verdarajum* Sastrà, in the part called *Streepunjayagum*.

(Signed)
TERUMALY KISTNAMA CHARIAR.

Remarks.

The authority cited is not on this side of India; and the opinion delivered in this case would not be here considered as good law. The husband himself violates the law, and is liable to punishment for his mis-

conduct. Surely the wife cannot be compelled to return to him, while he persists in it; and his reformation is not stated. C.

The entertaining a concubine is a justification to the wife, subjecting the husband (if she choose to live apart from him) to the obligation of maintaining her separately, *i. e.* of supporting her according to her condition; and, asserting her claim, she is entitled to her thirds, even during her husband's life. The strange law, above propounded, professes to be confined to Sudras; and it may possibly among this caste have some foundation in practice. E.

ZILLA OF CUDDAPAH.

D. Narayana,

v.

Jungum Nargaloo and Others.

(Ante, vol. i. p. 46. 54.)

Upon reference of the papers in the cause to the Pundit of the Court, he reported, that, if a man forsakes a faithful wife, by whom he has children, he should be ordered to take her back; and, on refusal, be made accountable to her for a third of his property. That if, under similar circumstances, he takes a second, leaving the first, without the consent of the latter, he is punishable, and at the same time answerable also to the first for her thirds; and that whoever was accessory to such second marriage, is likewise punishable.

Remarks.

The *Smriti Chandrica* teaches, that one, who deserts his wife without cause, is liable to be punished as a thief. It may be inferred, that the accomplice is subject to punishment likewise. That one who counsels, or approves an act, is an accomplice in it, is indeed a doctrine applicable equally to sins, as to crimes; and accordingly inculcated by passages of *Paithinasi*, *Apastamba*, and other authorities, cited by writers on penance and expiation; any more direct has not been found for the position. C.

The general law in the beginning of the opinion appears rightly delivered. I am not aware that punishment by the magistrate is any where appointed for a second marriage, howsoever contracted. E.

CHITTOOR PROVINCIAL COURT.

April and May, 1808.

(Ante, vol. i. p. 53.)

A Hindoo, having a wife, by whom he had a son, took a second, leaving the first, and afterwards died, leaving behind him a testamentary writing, by which, among other things, observing that his wife was unfit to manage his family, he gives her a thousand pagodas worth of jewels. The will having been referred to the Pundit of the Court, in his remarks upon this part of it, the Pundit said, that having born him a son, to whom there did not appear to be any exception, the pretence of the mother being incapable of managing the family, could not justify the deceased in taking another wife, dismissing the first on the terms stated; since, according to the *Achára Candam* of Vijnyaneswara, he was bound to have assigned to her a third of what he possessed; and, possessing nothing, to have provided her at least with food and raiment. That, supposing her to have had a portion on her marriage, she would, upon her husband taking a second wife, be entitled to the difference between it and the sum expended on the second marriage; and, if she had had none, then to a sum equal to the amount of such expense; that and the provision made her, not cor-

responding with either of these standards, was not consonant to law.

(Signed)

ALAGA SINGANA CHARIAR.

Remarks.

See passages of Yajnyawalcya and Vijnyaneswara, quoted by Jagannatha, 3 Dig. 8vo. ed. p. 17, 18. Also, Mitacshara, on Inh. ch. ii. sect. xi. p. 35.—The woman was entitled to a compensation, amounting, with her previous *Stridhana*, to a value equivalent to the expenses of the second marriage. C.

The best rule, in case of the abandonment of a virtuous wife, appears to be, that she is entitled to suitable maintenance, the ultimate measure of which is one-third of the estate of her husband; he also, according to the circumstances of the case, is liable to corporeal punishment. But the claim at all events ought to have been urged against the husband in his life; it cannot affect his heirs. The instrument left by the deceased is invalid; and the elder wife shares his estate, as such, with the other parceners, or continues in the administration of the united families, under the protection of his son.

E.

BOMBAY.

Broach.—Court of Adawlut.

April 25, 1810.

(Ante, vol. i. p. 49.)

On reference to us, agreeably to the law of Dherma Sastra, the case is as follows:—Kubyan, acknowledging his *disability*, requested that he might try the effect of medicine. Accordingly two months were given him for the purpose, to which a third was afterwards added, but no accession of virility was obtained. It was then proposed to him to submit to the test ordained by the Shaster; but he refused, offering instead to make his wife the judge, which was agreed to; but he never went near her, procrastinating matters, under various pretences, till about four or five days ago, when, having quarrelled at night, they came to us, reciprocally accusing one another. Upon the whole, from the declarations of the parties, and the deposition of the witness Umooluk, as well as from his declining the proof required by the Shaster, it appears to us, that Kubyan is impotent. Therefore, as his caste admit *natras* (or second marriages), he must release his wife; and, if he refuse, he must be compelled.

(Signed) NURBHUYARAM, *Shastree.*
WALUBHRAM, *Shastree.*

Remark.

This is analagous to cases, for which provision is made by a passage of Devala, cited by Jagannatha, b. iv. v. 151. C.

BOMBAY.

Court of Adawlut at Broach.

April 10, 1806.

(Ante, vol. i. p. 47.)

It is written in the *Pooranas*, that though a man be irreligious, immoral, and unfortunate, yet his wife is not at liberty to forsake him. Such is the case of the husband of Saukar, who is accordingly desirous to leave him and marry another, but it must not be permitted.

(Signed) NURBHUYARAM, *Shastree*.
ROOPSHUNKER, *Shastree*.

Remark.

Cases in which a woman may forsake her husband, are stated in a passage quoted by Jagannatha, b. iv. v. 151.

ZILLA OF VIZAGAPATAM.

Nov. 15, 1808.

(Ante, vol. i. p. 50.)

A Brahmin having, in default of children by his first wife, taken a second, an agreement was executed on the occasion between him and his first, by which it was, among other things, provided, that she should not be at liberty to dispose of her ornaments, without his consent. Upon which the following questions have occurred:

1. What is the right of a married woman with respect to her ornaments?

2. Was the agreement referred to competent between the parties?

3. Admitting it to have been so, is the wife answerable for a breach, in having disposed of some for her subsistence, her husband neglecting to provide for her?

Answer.

The jewels given by a husband to his bride, at the time of her marriage, or subsequently, in consideration of it, are her absolute property; and, as such, at her disposal. They are her *Stridhana*, and are distinguishable from what may be supplied her from time to time after, for the decorating of her person; the latter she can only wear; they remain

the property of her husband, forming no part of her *Stridhana*, nor of course disposable by her without his permission, even for her necessary maintenance. Taking the subject of the agreement in question to have been of this description, the stipulation was competent; and it being contrary to the rules of the Dherma Sastra, and the custom of the Banian tribe, for a wife to take upon herself to alienate such ornaments, even though for her necessary support, without her husband's privity, an action lies against her for so doing, independant of agreement, and much more so where there has been such a breach.

(Signed) DUSKY NARRAIN.

Remarks.

It the ornaments were not *Stridhana*, they must have been her husband's property; and, as such, could not be disposed of by her; and an action will lie in this case. But, if they were the wife's *peculiar property*, she had full power over them, laying out of the case the special agreement, as proposed to be done by one of the questions. And, even under that agreement, by which she promised not to dispose of them, she might nevertheless justify the breach, under circumstances of necessity, arising from his default in failing to supply her with necessary maintenance. At all events the promise being without equivalent, an action at law will not lie upon it, the breach of it being but a moral fault, not a civil injury. C.

I should think that if the agreement were made respecting her *Stridhana*, it would be obligatory (like any other engagement respecting property) on the wife. E.

See a distinction between worn and unworn ornaments, Menu, ix. v. 200. 3. D. 571. Mitacsh. ch. i. sect. iv. 19. This, it is apprehended, cannot refer to *Stridhana*, as *that* belongs to the wife, under any circumstance. T. A. S.

ZILLA OF GANJAM.

(Ante, vol. i. p. 51.)

A Brahmin having, at the time of his marriage, given some gold and silver ornaments to his wife, who continued to reside with her mother, and died many years after, never having lived with her husband, but having been supported during a great part of the time by her brothers, to whom does the succession to her ornaments belong?

Answer.

Though the woman in question never lived with her husband, yet if her conduct was otherwise unimpeachable, he was bound to provide for her; which, if he neglected to do, her brothers who supported her are entitled to be reimbursed out of the property in question, whatever they expended for her necessary maintenance. The remainder belongs to her surviving husband. The property of a woman dying without issue vests in her husband.

Remark.

The husband, on failure of progeny, is heir to the wife's peculiar property (her *Stridhana).* During her life, he was certainly bound to maintain her; and, any one else doing so, I should think such person, on the death of the wife, could have no right to withhold the jewels, &c. left by her, from the heir to them. He should be left to sue the husband for reimbursement; with respect to his right to which, a reasonable doubt would arise, should it appear he had voluntarily supported the deceased wife. S.

ZILLA OF CUDDAPAH.

May, 1807.

Siddummah, *v.* Gungooloo.

(Ante, vol. i. p. 53. 57. 61.)

The parties are man and wife. The Plaintiff having born the Defendant a female child, he thought proper to part with her, on the pretence of her having mixed noxious ingredients in his rice, of which there is no proof. Pregnant at the time of separation, she soon after produced him a boy. Under these circumstances he took a second wife; when their caste having been appealed to, he was warned to provide for his first. This he refusing to do, they expelled him; and the present action being brought, the question is, whether he is not bound to provide for her, and to what extent?

Answer.

It is said by Devala, that a man, desirous without cause given him by his first wife to take another, should conciliate his first by presents, and that then he may marry again. Menu says that, when the first, subject to continual indisposition, demeans herself properly toward her husband, he should make a settlement upon her first, before he takes another; being careful not to give her unnecessary offence. In the present case, there being no proof of misconduct on the part of the Plaintiff, if the Defendant was desirous to take another

wife, he should have reconciled the first to his purpose, by the prescribed means. It is further held by Nareda, that, if a man forsake an affectionate wife, by whom he has children, he is punishable, and compellable to take her back; and that, if he persist in refusing, he is bound to assign her a third of his property; and, if he have none, at all events to find her in food and raiment.

Remarks.

See passages, on which this opinion is founded, quoted from Yajnyawalcya, Vijnyaneswara, &c. in Jagannatha, book iv. ver. 72, and 74. C.

The title " Duties of man and wife," *Stripund'herma,* though forming technically one of the subdivisions of *Vyavahára,* or judicial proceedings, is considered in reality to be a branch of ethics; and some authorities deny that the infringement of these duties are cognizable by the ordinary magistrate. The better doctrine however is, that the restrictive texts, which appear to forbid the admission of suits between husband and wife, are intended only to indicate their impropriety, as regards the parties. Vijnyaneswara, therefore, in commenting upon this text, "The husband, if he do not please, is not liable " to repay the woman's property received by him in " famine, for charitable purposes, in disease, or under " arrest," says, " If the husband expend the wife's money, " excepting in famine, and the rest, and do not repay it, " though he possess wealth at the time when it is de- " manded, then an admissible suit may exist between

"them." But he adds, "Such disputes will prosper "neither in the visible, nor invisible world; and there-"fore the parties are first to be admonished by the king "and his assessors; but, if they persist, the cause must "proceed in the prescribed manner." The result is, that the admission of causes between man and wife ought, if practicable, to be avoided; but that justice must be administered, if the parties cannot be brought to terms. E.

DESCRIPTION OF A MARRIAGE BETWEEN TWO BRAHMINS;

Taken from a MS. Account of the Institutions and Customs of the Natives, in the Barahmal, and Salem Districts of the Peninsula.

(Ante, vol. i. p. 44.)

THE marriage having been agreed upon, the celebration of it takes place, on a lucky day fixed by the family priest (*Purohitâ*), or astrologer, for the purpose. On its arrival, the bridegroom with his parents proceed to the house of the bride, accompanied by the *Purohitâ*, with music, and dancing-women, attendants carrying presents of fruit. The next morning, either party having performed their ablutions and ceremonies at their respective houses, the parents of the bride repair to that of the bridegroom, when he, apprized of their approach, having a cloth tied round his head, taking a staff in his hand, and throwing a wallet over his shoulder, with perhaps a book under his arm, preceded by musicians, and accompanied by a few relations, walks out in a northerly direction, exclaiming, with a loud voice, "I "am going to *Causee*;"(1) upon which the parents of the bride, similarly accompanied, and contriving to meet him, request he will not go to *Causee*, and that they will give him their daughter. With this he stops; and, having a cocoa-nut put into his hand, the whole party

(1) Benares.

return together to the house of the bride, where being seated, the *Purohitá* commences the marriage rites. In the course of these, a cloth, by way of curtain, being suspended from the roof, the bridegroom sitting on one side, the bride on the other, the *Purohitá* recites verses to Vishnu, and other deities, praying them to watch over the destinies of the contracting pair. Then the curtain being removed, the bride and bridegroom pour handfuls of rice on one another's heads; while the father of the bride, having a little water and a piece of money in his right hand, puts them into his daughter's, and joining it with the hand of the bridegroom, says, "I give this "virgin to you for a wife." Upon this, the *Purohitá* invests the bridegroom with a second shoulder string; and a small gold plate, called a *bhuto*, with a hole in the middle, having a string through it, being first presented to the company present on a salver for their blessing, is given to the bridegroom, who ties it round the neck of the bride. The *Purohitá* then performs a *homam*, or burnt-offering, before the pair, putting grain into different pots. Other ceremonies follow, figurative of the ends of marriage, intermixed with *muntras*, or prayers, addressed principally to female divinities, for the happiness of the one in question. In the course of these proceedings, presents and offerings of clothes and fruits are made to the parties, and money distributed to the attendant Brahmins. Another homam being performed at night, the bride and bridegroom quitting the house, walk seven feet in the open air, gazing at the star named *Arundhati*, when they re-enter, and being reseated,

further ceremonies take place. These, with variations, are repeated five successive days. On the fifth, is performed the ceremony of dismissing the manes of their ancestors, who had been invoked to be present at the wedding. This is done by *chunamming* an earthen pot, and inscribing on it something like hieroglyphics. Other preparations being made, the new married couple walking round it three times, fill it with boiled rice, or platters made of leaves, as oblations to the manes, who are thus considered as dismissed to their celestial abodes. The rice being afterwards taken out, the pot is stored up by the family. On the evening of the fifth day, the parties seated in a palanquin, or mounted on horseback, preceded by girls dancing and singing, and *bajuntries* beating *tom toms*, sounding trumpets, and blowing flageolets, and followed by some of the married women of the family, parade under a canopy, supported by bearers, and surrounded by relations and friends. In this manner, the procession having traversed the streets of the town or village, returns to the bride's house, where the whole ends with a feast; the expense of the marriage being defrayed, as may have been previously agreed.

If, which is not generally the case, previous to her marriage, the girl has arrived at puberty, consummation takes place on the first lucky day succeeding the celebration of the nuptials; otherwise, not till she shews the characteristic signs. These appearing, and being made known, and the day fixed by the *Purohitá* being come, the bride is carried to the house of the

bridegroom, or rather it should be said now, the wife to that of her husband, when the ceremony of purification first, and afterwards a homam, or burnt-offering, is performed. Betel and money are distributed, and the relations of the respective families feasted, when the married couple retire.

Compare this account with the Abbé Dubois', p. 137, of the translation of his work on the "Character, Manners, and Customs of the People of India," &c. and with the one given by Mr. Colebrooke, in As. Res. vol. vii. p. 288.

APPENDIX TO CHAP. III.

ON THE PATERNAL RELATION.

ZILLA OF DARAPOORAM.

February 3, 1807.

Coopatravadoo, *v.* Sunjalatravadoo.

(Ante, vol. i. p. 68.)

The Plaintiff is the legitimate son of one Condatatravadoo. The Defendant is his son by a woman whom he kept. The father being dead, what becomes of his property?

Answer.

It is his son's, by his lawful wife, to the exclusion of the Defendant, subject to any gift that may have been made by the deceased in his lifetime; and this not in fraud of the rights of the Plaintiff, as his legitimate son.

(Signed) S. Sunkara, *Sastree.*

Remarks.

See Mitacsh. on Inh. ch. i. sect. xii. and Dig. vol. iii. p. 223. C.

The son is interested in his father's property, nor can any incident of birth deprive him of this inherent right. Differences however will exist, according to the circum-

stance of the mother. If she were a virgin of the same caste, the act of connexion would be equivalent to the ceremony of marriage; and the offspring would be entitled to a full share. Not so, if of an inferior one. A degraded caste in the mother degrades the offspring; but still it is entitled to a maintenance. With respect to Sudras, (all the tribes of which are, in law, nearly equal,) I am inclined to think that sons, of whatever description, are entitled to equal shares. E.

Common sense dictates that the natural children in this country, by kept women, who are a sort of inferior wives, should have some maintenance, which must be apportioned by reference to their wants, rank, and the amount of their estates. The bastards of Rajahs to the northward never pretend to claim a share; but they have food, and clothes, and are married by their brother, the Rajah; but then they serve him as peons, servants, slaves. They can have no right however to a share in any case. Such questions ought to be settled by a *Punchayat* of the caste's people. Any opinions upon them that we can pretend to give, must be open to error. There are different customs in different castes and places, which only the people of the particular castes can know exactly. T.(1)

In this case, I think the legitimate son is the sole heir to his deceased father's estate: nor do I believe the

(1) William Thackeray, Esq. deceased, late Member of the Council at Madras.

Hindu law, in any case, except in the instance of a Sudra's son by a female slave, recognises the heritable right of illegitimate children. The first in the series of heirs is male issue (*Putra*). But whom does the law include in this term? To this I should reply, 1. The real legitimate son. 2. Next, son of the son, or of the son's son. 3. The *Putra-pratinidhi*, or substitute-son. Again, of the *Putra-pratinidhi*, by the ancient law, eleven descriptions are recognised; and of these the *Pawner-bhava*, or son of the twice-married woman, alone might, in some instances, be regarded as "a natural son," in one acceptation of the term. But, in the present age, of the eleven subsidiary sons, the adopted son, of the two descriptions technically called *Dattaca*, or the son given, and *Critrima*, or the son made, is alone approved by the law and general practice. What constitutes a legal adoption, is a question involving many considerations, and which will not be here relevant. S.

ZILLA OF VIZAGAPATAM.

May 8, 1804.

(Ante, vol. i. p. 68.)

A man having an illegitimate son, whom he had educated and married, had afterwards children born in wedlock; and conceiving an aversion to the former, he turned him out of his house, denying his having any claim upon him. The case being referred to the Pundit of the Court, his opinion was, that the son in question being neither *Datta* nor *Aurasa*, (neither legitimate nor adopted,) and no other being inheritable in the *Cali* age, he could enforce no claim on the property of his putative father; that it was nevertheless competent to the latter, if he thought proper, to admit him to a share, and this without the consent of his legitimate issue; and that, provided he was free from vice, he could not, without violating the Sastras, refuse him food and raiment.

Remarks.

Issue by a concubine is described in the law as son by a female slave, or by a Sudra woman. If the father were a Sudra, he might have allotted a share to his illegitimate son. Mit. on Inh. ch. i. sect. xii. And the obligation of affording him the means of subsistence is declared in passages quoted in Jagannatha's Digest, vol. iii. p. 170. C.

How does the Pundit discover that this illegitimate son was not *Aurasa*, or son of the bosom? Why should

this term include only the son of a woman consecrated by the nuptial rites? and, if it do not, what becomes of the reasoning? It does not mean only the son of such a woman; for, if it did, the progeny of a *Gandharva* marriage would be excluded from succession; which, by the primeval law, they certainly were not; for, to avoid quotations, whether from the Smritis, or their commentators, did not the son of *Dushmanta* and *Sacontala* succeed to his father's throne? Not to pursue this strain any further, it may be safely asserted, that, to establish illegitimacy under the Hindu law, the circumstances must be implicitly stated; (we must have the thing before us, not the name;) and that nothing short of absolute degradation from caste is an exclusion from heritage. Even in this case, maintenance is positively enjoined.

E.

The *Aurasa putra* (literally, son of the breast), is described as the son begotten by a man on his lawfully wedded wife. Is a *Gandharva* marriage legal or illegal? If legal, the offspring of such a marriage would be legitimate; and, no doubt, the right of succession would arise.

S.

MADRAS.

Sudder Adawlut.

(Ante, vol. i. p. 69.)

Question.

Has an illegitimate son any, and what hereditary right?

Answer.

His father may settle a share upon him, if he make partition in his life.(1) On the death of the father, without partition, he takes, with his legitimate brothers, a half share.(2) If none, he is entitled to a share equal to that of a grandson, by a daughter.

Remark.

(1) See Mit. on Inh. ch. i. sect. xii. 1, and 2. (2)Provided the father do not belong to one of the three higher tribes: for this rule is restricted to the Sudra. 3 Dig. 143.

MADRAS.

Sudder D. Adawlut.

(Ante, vol. i. p. 71.)

Has the son of a Brahmin, begotten on a Sudra woman, any, and what claim on the estate of his father?

Answer.

To the extent of food and raiment.

Remarks.

Provided he be of good conduct, and, as expressed in the Mitacshara, (ch. i. sect. xii. 3.) *docile.* C.

The Court would presume the natural son qualified to receive maintenance, unless the opposite party could shew what, in the contemplation of the law, is a legal disqualification. S.

ZILLA OF CUDDAPAH.

July, 1807.

Sashumma, *v.* Somannah.

(Ante, vol. i. p. 71.)

The Plaintiff is the childless widow, having been the second wife, of Padda Lingapah, deceased, who had a son by his first wife, now about eleven years of age, having maternal relations. The deceased, when dying, expressed a wish that his brother Chinna Lingapah should bring up his son. The questions are, 1. Who is entitled to the deceased's property? 2. To whose care will it be fit that his son should be committed during his minority?

Answer.

His son is entitled to the property, subject to the rights of the two widows, who have a claim to as much as may suffice for their food and raiment, with a reasonable allowance to them for alms; and, beyond this it does not extend, however considerable the estate. 2. The deceased, when dying, having expressed a desire that his brother should take charge of his son, the latter, if so inclined, may live with his uncle.

Remarks.

The son is no doubt heir, and the widows are entitled to maintenance. See Mit. on Inh. ch. ii. sect. i. 20. It

belongs to the Court, representing the sovereign, to protect the rights of a minor. There is very little in the Hindu law on the subject; and a testamentary appointment of a guardian is not noticed in it. The latter part of the answer is therefore not founded upon particular law, but only expresses the Pundit's sentiments, as to what may be done in the exercise of the Court's discretion.

C.

"*And beyond this it does not extend,*" &c. No; not if sons be alive, or daughters either. E.

PROVINCIAL COURT OF CHITTORE.

(Ante, vol. i. p. 71.)

The child in question (a female one) is an orphan, having lost both its parents. There survive, connected with her, her maternal grandfather, paternal aunt, and a cousin of her father. Who, of the above three persons, is, according to the Hindu law, the proper one to take charge of her?

Answer.

The father's cousin.

Remarks.

The Pundit's opinion in favour of the cousin is founded upon his being a *Sapind* of the father. The Raja, however, or sovereign, is the legal guardian, (Jagannatha's Digest, vol. iii. p. 542.) and may compel any of the child's relations to take care of her; the charge devolving on the paternal male kindred, rather than on a maternal ancestor, or females. (1) C.

(1) See 3 Dig. 544.

ZILLA OF COMBAGONUM.

June 27, 1809.

(Ante, vol. i. p. 71.)

The lands belonging to the Plaintiff, an infant of eight years, (suing by his guardian,) were mortgaged by his brother-in-law, without the privity of any one belonging to him. Is the mortgage good?

Answer.

It is not.

(Signed) P. VENCOO, *Sastree.*

Remark.

The brother-in-law could have no authority to interfere in the minor's affairs, unless acting as guardian to him with the approbation of the sovereign, who is the legal guardian of all minors. C.

ZILLA OF MADURA.

(Ante, vol. i. p. 72.)

Question.

The father being dead, at what age is his son liable for his debts?

Answer.

Not till after seventeen.

(Signed) SASHADREE JYENGAR.

Remarks.

The son is of age at sixteen years complete, or at entrance on his seventeenth.

Jagannatha, in his Digest, says the sixteenth year, or end of the fifteenth, overlooking several authorities which are express as to this point. (Dig. vol. i. p. 293.) Thus Vireswara, the commentator of the Mitacshara, says, "a youth is independent immediately after sixteen years." Bhavadêvi, commenting on a passage of Vrihaspati, concerning performance of penance by a boy under sixteen, observes, "a boy above eleven years, to the end of sixteen, "must be here understood." Herenat'ha, author of the Smriti sara, expounds the words "after the minor has "passed adolescence," in a passage of Catyayana, as signifying above sixteen years. And Raghunandana, the great authority of Bengal, says, "one who has not arrived "at years of discretion, is one whose age is less than "sixteen years." C.

ZILLA OF CUDDAPAH.

June 9, 1807.

Soonkoo, *v.* Gooroovadoo.

(Ante, vol. i. p. 72.)

The petition states, that Ellaloo, the father of the Defendant, borrowed of the petitioner jewels, upon which he raised money by pawning, for payment of a debt to the Circar; and that he is since dead, not having returned them as he engaged to do. The Defendant, in answer, alleges that his father *kept* the petitioner; and, it is in evidence, that, possessing, as she did, a separate house, the deceased was in the habit of visiting her, night and day. He further alleges, that he was not maintained by his father, but by a maternal uncle; and that he is at this moment but a boy. This is so: at the same time, it is in proof that he rents the arrack farm, which his father held before him. Under these circumstances, is he answerable for the jewels in question?

Answer.

It is said by Vrihaspati, and in the Smriti Chandrica, that a son is not of age till sixteen. Other authorities say not till seventeen or eighteen. In the present case, as the Defendant, from holding the arrack farm, must be considered as equal to the carrying on of business, he should be held answerable.

Remarks.

The whole current of authorities fixes majority at sixteen years, which Jagannatha and Servara, compilers of digests, explained to mean the entrance on the sixteenth year; but which elder commentators, of greater weight, understand to mean sixteen years complete.

A son is bound to pay his father's debts. (Digest, vol. i. p. 267.) It is observed, however, by Sir William Jones, that, without assets, the obligation is a moral and religious, not a civil one. Note on Digest, vol. i. p. 266.

C.

ZILLA OF CUDDAPAH.

Nov. 13, 1807.

G. Chenchoo, *v*. J. Latchumorah.

(Ante, vol. i. p. 72.)

The Plaintiff, a minor, of thirteen years, complained that the Defendant having adopted him, subsequently adopted another, and had since turned him out of doors. The reference to the Pundit was, as to his competency to call the Defendant to an account in judicature, being a minor only. The Pundit reported him as not competent, till he should have attained the age of sixteen complete.

Remark.

He may sue through his guardian, or *prochein amy*. Vyása and Vrihaspati, (cited in various compilations,) having declared that a kinsman may institute and defend suits for a minor, a woman, an idiot, or insane person, &c.; upon which commentators have observed, that, whether delegated, or not, a well-wisher of persons, so incapacitated, may plead on their parts. C.

ZILLA OF COMBACONUM.

October 14, 1808.

Samavien, *v.* Shistnien.

(Ante, vol. i. p. 72.)

In this suit on bond, the Defendant having been sent for by the Court, and appearing to be an infant of ten years only, the Pandit (Vancoo Sastree) having been referred to, as to the course to be pursued, reported against proceeding in the action.

Remark.

According to Nareda, and many other authorities, a minor (explained in the Smriti Chandrica to be one who has not completed his sixteenth year) can neither be arrested, nor summoned to answer a suit: and a trial, in which a minor, or insane person, is plaintiff or defendant, is pronounced to be wrong, by the Mitacshara, and other commentators on Yajnyawalcya. A kinsman, however, being a well-wisher of the minor, &c. is, by a passage of Vrihaspati, authorized to institute and defend suits on their parts. In the silence of the law, the courts must discriminate cases, in which the suit should proceed, defended or instituted by a friend, or guardian; and those in which it must be postponed, until the minor come of age. C.

ZILLA OF COMBACONUM.

January 22, 1808.

Ramasamy Jyen, *v.* Sachappien.

(Ante, vol. i. p. 72.)

The Defendant in this cause being superannuated, and unable to speak; may his son be sent for to come and carry it on?

Answer.

The son of a man in such a state may be sent for to carry on the cause.

(Signed) VENCOO SASTREE, *Pundit.*

Remark.

Vrihaspati says, "A man occupied with sacred literature, engaged in the celebration of nuptials, afflicted "with disease, oppressed by sorrow, insane, under age, "intoxicated, old, sued by another, busy in the king's "affairs, or engaged in austerities; a warrior while war "depends; a husbandman during sowing and reaping; "and persons involved in straits; must not be arrested: "nor a woman; nor any person who is dependant on a "master."

The author of the *Viramitiódaya*, commenting on a similar passage of another legislator, observes, "These "persons must be summoned at a subsequent time. "But, if an immediate citation be indispensably necessary, the son, or other representative, should be summoned."

The opinion is therefore correct. C.

APPENDIX TO CHAP. IV.

ON ADOPTION.

ZILLA OF VIZAGAPATAM.

(Ante, vol. i. p. 75.)

Question to the Pundit.

Among the twelve sorts of sons, are not the *Dwyámushyáyana*,(1) &c. disqualified from inheriting in the present age? And, can any inherit in it but the *Datta* and *Aurasa*, the adopted, and the legitimate natural born?

Answer.

The right of inheritance is restricted in the *Cali yug* to the two descriptions of sons specified in this question, in exclusion of the other ten.

(Signed) PANDIT APPIAH, *Sastree.*

Remark.

The answer is conformable to the doctrine received in most of the Indian schools of law. It rests on the authority of passages which are quoted as authentic by the *Smriti Chandrica*, and other works received in the South of India, particularly Saunaca and Vrihaspati, cited in those works. C.

(1) For an explanation of this, see Mitacsh. on Inh. ch. I. sect. x.

ZILLA OF SALEM.

Nov. 15, 1803.

(Ante, vol. i. p. 76. 79.)

The deceased left two widows, together with a widowed sister, who had lived with him after the death of her husband; also a mother.—To whom does his estate go?

Answer.

The mother must be maintained, and so must the sister, if left destitute by her husband. As to the widows of the deceased, they should adopt a boy; but if they cannot agree to do so, then the estate, after deducting as above, is divisible between them: and whatever remains out of the portion set apart for her expenses after the death of the mother, it is theirs.

Remarks.

These widows' right of succession is declared by the Mitacshara, on Inh. ch. ii. sect. i. 19.—Passages of law recommend, but do not enjoin, adoption; particularly *Atri.* (Institutes, 52.) "By him who has no male issue, a substitute for a son should be adopted, for the securing the oblations of food, and libation of water to the manes." And a text of Menu, of similar import (which does not however occur in his Institutes), says,

"By him who has no male issue, a son, such as it may be practicable to obtain, should be adopted, for the sake of the oblation of food, and obsequies, and for the honour of his name." C.

A woman cannot adopt, without the express sanction of her husband. S.

MADRAS.

Sudder Dewanny Adawlut.

(Ante, vol. i. p. 78.)

A Hindu, employed in the army, leaving at his death, beside a betrothed wife, with whom consummation had not taken place, concubines, and adopted, as well as illegitimate children; and, with respect to property, a pension payable to his heirs.—Who are in this case his heirs?

Answer.

The adopted children are entitled to the pension, subject to the obligation of maintaining the deceased's concubines. It is so held in *Vivandabhargasvana*, "on partition of patrimony."

(Signed) VENECTASA, *Sastree.*

Remarks.

A Hindu cannot have legally adopted *children*. A son, legitimate or adopted, existing, any subsequent adoption would be invalid. At least, the son so adopted, would not inherit. Presuming in the present case a lawful adoption, the first adopted is sole heir. The wives, to the usual extent, the illegitimate children, and perhaps sons, illegally adopted, would be entitled to maintenance. S.

To this opinion Mr. Sutherland adhered, on a subsequent communication with him, referable to the doctrine in the text, supr. vol. i. p. 78, enlarging upon it, as follows. "I question (said he) the accuracy of this doctrine, though supported by the authority of the case cited, as well as by Jagannatha, in his commentary on a text of Sancha and Lichita. The argument against it is this. The authors of the *Dattaca Mimansa*, and *Dattaca Chandrica*, restrict adoption to the case, where male issue, capable of performing exequial rites, is wanting;—but a son given represents the real son, and is in law such issue. The author of the Digest (it is true), in his commentary on text cccviii. (vol. 3.) states that sons of various descriptions may be adopted by one, desirous of numerous offspring; but, of these, in the present age, only the son *given*, and (in some places) the son *made*, are tolerated. The inference is, that the author of the Digest has erroneously applied to the present age a part of the law, confessedly abrogated."

Of the same opinion was the Shastry, consulted by Mr. Willoughby of Barrode, expressly for this work; confirmed by that gentleman himself.

(For "Remarks on the answer of the Pundit, as it regards the claim of the virgin widow," see the same case in Appendix to ch. ii. on marriage, p. 32.—And, as to the competency of two co-existing adoptions, see the case of Coureepershaud Rai Jyamala, Beng. Rep. 1814. p. 466.; and vol. i. of this work, p. 78.)

T. A. S.

ZILLA OF CHINGLEPUT.

July 2, and 5, 1803.

(Ante, vol. i. p. 79. 85. 91. 94. 96.)

The parties are Sudras, and the Plaintiff being a widow, her complaint is, that the Defendant withholds from her her husband's estate, alleging that he was adopted by him.

Ques. 1. What are the requisites of adoption among Sudras?—2. Does an adopted son succeed to the estate of his adoptive father, in preference to the widow?

Answer.

Among Brahmins, adoption should regularly be before the performance of the *Upanayana:* it will be valid however, though these should have previously taken place: but there can be no adoption of one who is married. Neither can an only, or an elder son be given. When a boy is to be adopted, the adopter should invite the relations of either party, and entertain them at his house, giving notice to the king (or principal authority of the place) of his intention; and then the husband and wife, waiting upon the parents of the boy, and stating that they have no son of their own, should ascertain if they are willing to give them one of theirs;—to which they assenting, the *Datta-homam* must be performed.(1) After adoption, the *Upanayana,*

(1) Vid. post, p. 218.

and the marriage of the adopted are to be celebrated by the adopter, the same as for a natural son; and all rites are to be performed in the *gotra* of the adopter, not of the adopted.—The same ceremonies, with the exception of *homams*, are to be observed in the other castes. The water called *Manjenum* should be drank in the presence of relations. The death of the husband approaching, so as not to leave time for the ceremony on his part, the widow, with his permission, may adopt. In either case, the adopted succeeds to the estate of his adoptive father, subject to his debts, and to the obligation of maintaining the widow.

(Signed)
T. KISTNAMA CHARIAR, *Pundit.*

Remarks.

Most of these rules are general: they are not all imperative. The notice to the king may be dispensed with. Vijnyaneswara distinctly prohibits the adoption of an only son, as does also the *Dattaca Mimánsa* of Nanda Pundita. In other respects, the rules and forms above stated are conformable to these authorities. No doubt, the adopted son is heir, in preference to the widow. See Mitacsh. on Inh. ch. i. sect. xi. 9. 15. 33. C.

The general law of adoption appears to be stated above with sufficient correctness.—With respect to Sudras, the *Datta Mimánsa* of Madhavyum, (the principal

author in Southern India on this point, as well as on *Mimansam* in general) says, that " to the Sudra there is no adoption;"(1) by which, however, is to be understood only that, in this caste, there exists, strictly speaking, no ceremonial for it; but that public avowal, or general notoriety of the fact, is sufficient, with them, to establish its validity. Ceremonial adoption cannot be necessary in the case of a Sudra, since, by the *Datta-Homam*, the adopted son is converted from the stock *(gotram)* of the natural, to that of his adoptive father; and Sudras have no *gotra*. Beside, they cannot perform the Datta-Homam, though they may perform an imitation of it, with texts from the Puranas. But the proper Datta-Homam can be performed only by those castes, which use the texts of the Vedas in their religious ceremonies;—and, in Southern India, scarcely any caste but that of the Brahmins now use these texts.—Therefore it is, that Kistnama Chariar, the Pundit, very properly restricts the rite of adoption to the Brahmins.

E.

(1) Vid. post, p. 91.

ZILLA OF SALEM.

Nov. 15, 1803.

Chellummal *v.* Munummall.

(Ante, vol. i. p. 79.)

Nellapa Reddy, deceased, left two wives, the parties in the present suit. The former complains that, as their husband is dead, leaving no issue, his estate should be divided, and she should have half. The defendant *Munummall* represents, that, as her husband's sister, a widow, lived long in the family, having become in a manner mistress of it on her husband's death, all the estate is in her possession; and she proposes that, there being, as she alleges, no custom in their caste for a division, a boy should be adopted, through whom they may obtain salvation. Add to this, the mother of the deceased *Nellapa Reddy* is living. Therefore, how stands the law, as to dividing the estate between the widows of *Nellapa?* and what are the claims of the mother and sister of the deceased?

Answer of the Pundit.

The mother of the deceased, being otherwise unprovided for, sufficient allowance must be set apart from his estate for her maintenance. As to the remainder his widows ought, with mutual consent, to adopt some one. If they cannot agree to do so, they should divide the estate between them equally. If the deceased's sister derived nothing from her husband, they should

contribute jointly toward her support. Upon the death of the mother, whatever may remain of her portion, after deducting her funeral expenses, should be in like manner divided.

Remarks.

If the requisite sanction had been received by either of them, mutual consent of the widows to adopt could not be necessary unless specially made a condition; nor, without such authority, could it suffice. See note on Mitacsh. Inh. ch. i. sect. xi. 9. Supposing no adoption authorized, or none made under an authority for the purpose, the widows, having equal rights in the estate, may no doubt share it, making due provision for the maintenance of those whom they are both bound to support. C.

This appears rather a question of partition, than of adoption. Adoption in this case was certainly not necessary, and perhaps not proper. To render it beneficial to the husband (for the widows can derive no advantage from it), his assent to it should have been given before his decease; but there is nothing in the case to shew, even by implication, that it was so. As no spiritual benefit results to a woman from adoption, there can be no adequate motive on her part for the act; and the *Sastree*, therefore, though, in compliance with worldly custom, he might have recommended adoption, should not have stated it to be in any degree obligatory. He should at most have said *may*, not *ought*. E.

ZILLA OF VIZAGAPATAM.

(Ante, vol. i. p. 80.)

Question to the Pundit.

Upon the death of a Brahmin, without issue, can his widow adopt?

Answer.

She may, having her husband's authority;—not otherwise.

Remark.

The answer is according to the doctrine of the Bengal school; but the followers of the Mitacshara, in the Benares and Maharashtra schools, admit the widow's power of adoption, without authority from her husband, if she have the sanction of his kindred.—See notes to the Mitacshara on Inh. ch. i. sect. xi. 9. C.

ZILLA OF VIZAGAPATAM.

(Ante, vol. i. p. 79, 80.)

The deceased, in his last moments, expressed his wish, that his mother should adopt his nephew as his heir; and died leaving a widow, aged five—. To whom does his estate belong?

Answer.

The mother was competent to adopt, having her son's direction for the purpose; and if she have complied with it, the adopted succeeds:—otherwise, the mother and widow together take the estate of the deceased.

Remarks.

Presuming the deceased to have been sole owner, the adoption of his nephew, (Quest. whether brother's or sister's son?) by his mother, would not make that nephew, thus becoming an adopted brother, heir at law to his separate estate. The widow was undoubtedly sole heir, (Mitacsh. on Inh. ch. ii. sect. 1. 39.) bound however to maintain her husband's mother. Quest. Did the request to the mother to adopt his nephew as *his* heir, mean the completion of an adoption begun by himself? or, as I understand it, the adoption of that nephew, as *her* son? C.

The facts perhaps are not stated with sufficient distinctness: but I am not aware that there is any thing

incompatible in the delegation of a mother to adopt, in the case of non-age of a widow. It should be observed, that the act of adoption is not on her own account; she acts merely as the deputy of her son; and the child adopted therefore becomes his, not her's. The Hindu law and religion allows of vicarious substitution, in almost every possible case. E.

I do not think the adoption by a mother, of a son for her deceased son, would be valid. In fact, *Nanda Pundita* denies the competence of a widow, even with the sanction of her husband, to affiliate a son for him: but the reason he assigns is unsatisfactory, and his position is controverted by other writers. (See note to § 9. sect. 11. of ch. i. of Mitacshara on Inheritance.) Though however adoption by a widow, under delegated authority from her husband, would be valid, it by no means follows that, under authority from her son, the adoption for him, by his mother, would be so. In the former instance, the widow not only adopts the son for her husband, but also for herself: this however would not be the case in respect to the mother. S.

ZILLA OF VIZAGAPATAM.

(Ante, vol. i. p. 80. 93.)

If a widow, having a son, should be desired by him, on his death-bed, to adopt another in his room, will an adoption accordingly be good, being of one competent to be adopted?

Answer.

The father, while she is young, her husband after marriage, and her son in her widowhood, have the natural control over females, whose respective sanction will authorize whatever they may do. It is universally held that they can have no will of their own ever. If, therefore, in the present case, after the death of the husband, the son, dying, directed the adoption that took place, it will be good.

Question II.

Was it necessary for the authority to adopt to be in writing?

Answer.

Permission in writing is certainly best, but verbal will do. The power takes effect from the assent of him who gives it, and a writing is not of the essence of the thing. Therefore, by whatever means it is understood to have been given, no defect will result from its not being in writing. The advantage of a writing is only as it renders the evidence more permanent.

(Signed) Dusky Narrain, *Sastree.*

Remarks.

As the husband's kindred may authorize the widow to make an adoption, (see note to Mitacsh. on Inh. ch. i. sect. xi. 9.) wherever the authority of the Vijnyaneswara, Mryacha, and works of the same school is followed, her son's sanction would no doubt be sufficient. It is otherwise in Bengal, where no sanction but the husband's can avail.

A written authority is doubtless not indispensable. C.

The text of the Hindu law is, "*Patra vacshati vest, hápyé na stu swa tantia truyati,*" meaning that *the son protects her in her old age;—no woman is ever independant.* That the son, standing, to his widowed mother, as regards general protection, and the regulation of her will, in the place of his father, has, under the law, prescribing the consent of the husband as necessary to authorize adoption by her, a competency to invest her with such power,—this is impossible: but nowhere, in any *Sastram*, is it stated, that the consent of the son is necessary to legalize adoption by his mother. He does not in this respect represent his father: the protection he is bound to extend to her is distinctly that of a son, not of a husband; he does not govern her will, he only guides it; he does not command, he persuades. On adoption, and similar questions, he may advise—he cannot authorize. E.

In the case of the Zemindar of Rajashahy, cited in that of the Rajah Nobkissin, Supreme Court, Calcutta, in the time of Sir John Anstruther, Ch. J.

([1]) Translation of Bengal paper, dated 9th of *Burnagur*, under the signature of Rajah Ramahaunt; addressed to the Rannee Boshannee Dehya, authorizing her (as his widow) to adopt a son after his decease.

"I grant this license in the year 1153 ( ), "being visited by an inveterate disorder, which increases "daily, and unable to foresee what the Divine Providence "may ordain the next moment. It was my wish to adopt "a child myself; but at present there is none at hand. "To send for one would be attended with delay, which "I should have no hopes of outliving. I therefore, of "my own free will, permit you to adopt a son. After "my death, whenever you may meet with a child, you "may adopt him in my name. So that the daily offerings "for the salvation of our souls may be duly performed, "and our possessions and dignities perpetuated. These "duties shall appertain to that son and his posterity; "and to no one else. Furthermore, you will be careful "to educate him properly, and in due time commit my "possessions and dignities to his care. If you fail here-"in, the sin of neglecting my salvation will be upon you. "I have granted you this license, and am hereby exone-"rated."

(1) Vol. i. p. 81.

ZILLA OF SALEM.

June 12th, 1810.

(Ante, vol. i. p. 83. 85.)

The deceased, in possession of property, without issue, leaving a widow, and a mother, may either, and which of them, adopt; and whether from another *gotra*, or should the selection be from their own?

Answer of the Pundit.

The deceased's widow may adopt. If she can get a boy of their own *gotra*, he should be preferred: if not, she may adopt from an *annia gotra*, or different family, being still a near relation.

Remarks.

If duly authorized, the widow may no doubt adopt; and is enjoined to give the preference to the nearest relation who is eligible. (See *Dattaca Mimansa.)* But the validity of an adoption actually made, does not rest on the rigid observance of that rule of selection; the choice of him to be adopted being a matter of discretion. C.

The text on which this point of law turns, is, as to its interpretation, more disputed than any other. The readings are various; and what this Pundit has rendered a "near relation," others construe, *not belonging to*

a distant country. The general law, however, which governs the choice of a son for adoption, is, that the adopter may legally take him from his own, or from a different *gotra;* but he ought conscientiously to take him from his own; and, in preference, from his *Sapindas* (or near kindred); or, in default of these, from his *Samánodacas*, or *Saculyas* (degrees of remote kindred). If, however, a person choose to reverse the prescribed order, though he thereby contracts a sinful taint, he does not incur legal animadversion in consequence; and I doubt if it would be competent for the king, at the suit of any person whatever, to prevent the completion of the act;—certainly it could not be reversed, if once performed. E.

ZILLA OF CUDDAPAH.

May 17, 1806.

(Ante, vol. i. p. 83.)

Question.

Is the adoption by a maternal uncle of his sister's son legal?

Answer.

If the *Chudam,* and *Upanayana* (tonsure and investiture of the adopted) were performed in the gotra of his adoptive father, then his adoption will be valid, though born in a different one; otherwise, it is irregular.

Remarks.

Adoption of a sister's son is strictly prohibited, unless in the case of Sudras. *Nanda Pundit's Dattaca Mimansa.*

The parties in this case, it is inferable, must have been *Sudras.* It is not competent, according to a generally received opinion, for a Brahmin to adopt a sister's son. I have not, however, been able to discover the authority for this; but the reason assigned is, that the relation of the mother, who could not have become the wife of the adoptive father, forbids it.

Since the above was written, I have found sufficient authority for the position, though it be not noticed by

Vidyáranga, Vijnyaneswara, or Turca Punchánana. It is from the *Datta Caustab'ha*, and is corroborated by the *Datta Mimansa of Sri Rama*, a book of some authority in the southern provinces. These two works I have in the college, in one book. I quote, as follows, from the former. "On failure of a *Sapinda*" (a relation who performs obsequies to the same ancestors), "an *Asapinda*" (a remoter relation), "or even one of a "different gotra may be adopted: in that case, however, "a daughter's son, and a sister's son are excepted; "but the daughter's son, or sister's son of a Sudra, "may be taken in adoption. Thus the elder Gautama. "Among the three first castes (Brahmins, and the rest), "the practice of adopting a daughter's, or a sister's son, "no where exists." The author of *Datta Caustab'ha* states this as the settled law; but *Sri Rama* allows of an exception. He says, "in distress *(Apadi)*, when "no other son can be procured, the son of the daughter, "or of the sister of a man of any of the three higher "classes, and in case of a Sudra universally, may be "adopted." In practice, the adoption of a sister's son, by persons of all castes is not uncommon; the authority above quoted, resting as it does on a single text, and that not pointedly prohibitory, cannot be considered sufficient to vitiate such adoptions.

MASULIPATAM, PROVINCIAL COURT.

July 27, 1809.

Prayaga Venkana - - *Appellant.*
Lachshemg - - - *Respondent.*

(Ante, vol. i. p. 83. 84. 85.)

The Appellant and the husband of the Respondent being full brothers, the latter, during his last illness, gave instructions to the Respondent to adopt a boy from the family of any of his cousins. The Respondent being about to do so, is prevented by the Appellant, the brother of her deceased husband, who insists that she is bound to adopt his son. The objection to this is, that his son having been already invested with the Brahminical string, is consequently no longer capable of being adopted.—Quest. Whether the widow is prohibited by the Hindu law from adopting at her pleasure from the family of any relative of her husband, or restricted to that of the Appellant, and this notwithstanding the objection that is urged by her?

Answer of the Pundit.

The son of the Appellant is adoptible, notwithstanding the objection stated.

It is held that Brahmins shall adopt sons from the families of their *Sapindas*;(1) if boys from such cannot

(1) *Sapindas*; those who offer the funera cake to the same ancestor.

be procured, then from those of their *Sagotras*:[1] never from other families. The meaning is, that they shall prefer the sons of brothers; failing these, they are at liberty to resort for the purpose to that of a distant cousin. To shew that Brahmins are not at liberty generally to adopt boys distantly related, and that it is competent to adopt a brother's son, though invested with the Brahminical string, a text in *Chandrica*, as quoted from Sareswaty Valasum, says, "If, among several "brothers by the same mother, one shall beget a son, "the rest are said to be thereby blessed with sons." Whence it may be inferred, that while there is a possibility of adopting a brother's son, another shall not be preferred. In *Datta Mimansa*, Sankala says, "A "Brahmin, destitute of a son, shall adopt a boy from "the families either of his *Sapindas*, or his *Sagotras*." According to which book also, the sons of brothers invested with the Brahminical string may be adopted; and adopting the sons of brothers is most consonant with custom.

Remarks.

The passage cited as from Sareswaty Valasum, or one of precisely similar import, occurs in Menu, ch. ix. 182. Under this, and other texts of law, as generally understood, a preference is to be given to a brother's son; on failing such, a more distant male relation; but not so exclusively as the opinion here delivered seems to imply. See Mitacsh. on Inh. ch. i. sect. xi. 13. and note. C.

(1) *Sagotras*; those who are descended from the same patriarch.

It is not incumbent on a person to adopt the son of a brother, or other Sapinda. The law merely states this as preferable, but without prescribing it;—certainly it does not give to the Sapinda any right to enforce such a preference, and the Appellant could not, therefore, I am clear, maintain this action: this is the point which the Pundit ought properly to have considered. With respect to the ineligibility of a person for adoption, on whom the *Upanayana* rites have been performed, it is much disputed: the more correct, because the more reasonable opinion, would appear to be, that he is eligible, if of the same gotra (family);—ineligible if of a different gotra, from the adopter; for if of the same gotra, the *datta homam*, though proper, is not necessary: if of a different gotra, the *datta homam* is necessary, and it cannot be performed on one, who, by the rites of the *Upanayana*, has been definitively established in his natural gotra. E.

ZILLA OF NELLORE.

(Ante, vol. i. p. 85.)

By the Pundit.

There being no law to justify the adoption of an eldest son, who has performed the funeral rites of his deceased father, such an adoption will not carry with it the inheritance of the adopter.

Remarks.

Mitacsh. on Inh. ch. i. sect. xi. 21. C.

Right, certainly. An eldest son is forbidden to be given in adoption; but some authorities make exception to this. E.

ZILLA OF NELLORE.

(Ante, vol. i. p. 85.)

By the Pundit.

If a man having two brothers, who have each an only son, adopt his wife's sister's son, and die, such adopted is entitled to his property, the adoptive father's nephews being only sons, not being eligible to adoption.

Remarks.

Only sons not being eligible, (Mitacsh. on Inh. ch. i. sect. xi. 11.) a more distant connexion might in this case be selected with perfect propriety; notwithstanding the preference due in other circumstances to a nephew. (Ibid. § 636.) C.

The adopted wife's sister's son is certainly, in this case, entitled to the estate: but the *taking* in adoption a brother's only son is not forbidden; the *giving* is, except as has been before seen, in *times of calamity.*— Post, p. 107. E.

ZILLA OF NELLORE.

(Ante, vol. i. p. 81. 84. 85. 101.)

By the Pundit.

If a man have no male issue of his own, it is stated in many books that he may, under the pressure of distress, adopt the only son of a brother.

Remarks.

If a brother's only son be adopted, he need not be taken away from the family of his natural father, but may continue to perform the offices of son, both to him and to his adoptive father. See notes to Mitacsh. on Inh. ch. i. sect. x. 1, and sect. xi. 32. A valid adoption of an only son cannot otherwise be made, the absolute gift being forbidden. (Mit. on Inh. ch. i. sect. xi. 11.) C.

Apadi, or *Apatcalé*, in distress, or in time of distress, is frequently assigned as a reason for similar exceptions. If, by reference to it in the present instance, it be meant that the adopter shall take his brother's only son, only when necessitated to do so, by not being able to procure any other person for adoption, the Pundit has, I think, confounded the taker and the giver; for it is the latter that the law contemplates as being compelled by his necessities to part with his only son. It is the opinion of some, and is entitled to attention, be-

cause it is founded in reason, that where the son of a brother, whether an only son or not, exists, here is no necessity for adoption. It is supported by Menu, [1] who declares that, if among many brothers, one beget a son, this single birth has the same spiritual effect, as if they had all become fathers. He is, in fact, *put-tra*, drawing (*trayati*,—trabit) each from (*put*) purgatory. The point is scarcely worth further discussion, the undoubted law in this, as in all other cases of adoption, marriage, &c. being,—that if the act be duly completed, it cannot be reversed. E.

(1) Ch. ix. v. 182.

ZILLA OF COMBACONUM.

Sadaseva Pillay, *v.* Vadaganada Pillay.

(Ante, vol. i. p. 87. 88. 90.)

Upon a question of adoption, the Pundit certified that it was good, though oral, and the adopted at the time an adult, being a brother's son.

Remarks.

See Mitacsh. on Inh. ch. i. sect. xi. 13. A difference of opinion prevails in regard to adoption of adults, or persons for whom certain ceremonies termed *Sanscara* (marriage of Sudras, and tonsure of the higher tribes) have been performed, the prevalent doctrine, in most parts of India, being adverse to it. The objections are less forcible in the instance of a relation of the male side, than in the case of a stranger. C.

Correct,—as seems to me. E.

ZILLA OF VENDACHELLUM.

April 29, 1808.

Sree Mootum Ramanoojyungar, *v.* Appooyungar.

(Ante, vol. i. p. 88.)

The Plaintiff is the adopted son of a woman of the name of Janike Ummal, being the son of her elder brother's daughter, the *Upanayana* of the boy having been subsequently performed in the house of his *natural* father, where he continued to reside. The Defendant is her *Cama puttra*, or illegitimate son, fostered and brought up by her, previous to the adoption of the Plaintiff. Subsequent to the adoption, she conveyed away her property to her illegitimate offspring, by a deed disclaiming the Plaintiff as her adopted. She being since dead, 1. Quest. Was the adoption of the Plaintiff invalidated by the performance of the Upanayanum, and the residence of the adopted, in the house of his natural father?—2. Could the deceased disclaim the adoption?—3. To whom does her property descend?

Answer.

The adoption is not affected either by performance of the *Upanayana* in the house of the natural father, or by the residence there of the adopted; nor could the deceased in her life, by any act, disclaim at her pleasure the son she had so acquired. Her property descends to her adopted.

Remarks.

Adopted sons, being duly initiated by the adopter under his own family name, become sons of the adoptive parent. (*Cálicá purána.* See Mitacsh. on Inh. ch. i. sect. vi. 13.) The *Upanayana*, though performed in the natural parents' house, if done with the family name of the adoptive one, would not be irregular. It can be of no consequence where it takes place, only it must be performed in the name of the adopter's *gotra.* The adoption cannot be affected by the residence of the adopted, which can but raise presumption as to the fact:—being once completely and validly made, it cannot be recalled. A natural child being excluded from the rights of a son, and none being now allowed, but legitimate issue, and adopted sons, the adopted in this case, if regularly so, was the heir. (Mitacsh. on Inh. ch. i. sect. xi. 21.) Education and nurture do not constitute any relation entitling to inheritance. C.

The question is not, whether an adoption could be dissolved; but, whether Janike Ummal could possibly have any right whatever to adopt. Certainly, a Brahmin widow (as, from the name, this woman must have been) cannot adopt, without the consent of the husband, obtained before his decease; and it nowhere appears here that such consent had been given. Again, this woman could convey no right to the estate of her husband, either by adoption, or any other act; as she must have forfeited her own right, by the impurity of

her conduct; nor could she convey right to any separate property of her own by adoption, a Brahmin woman having no power to transmit such property, which must descend, as fixed by law. E.

It does not appear that Janike was, or ever had been, a married woman. The contrary is rather to be presumed. According to the facts, as stated, the adoption would seem to have been a spurious one; and, in this view, the case, including the remarks upon it, is valuable only for the *dicta* it contains.

T. S.

ZILLA OF CHINGLEPUT.

May 21, 1803.

(Ante, vol. i. p. 93. 95. 96.)

The father of a family, who had no male issue, having maintained for a long time a young lad, whom he had intrusted with his affairs, and professed to have adopted, of which evidence existed in writing, but which is lost, adopted another.—Is the latter adoption valid?

Answer of the Pundit.

If one maintain another for a length of time, professing to have adopted him, and in fact committing all his affairs to his charge, having, upon his beginning to do so, invited and entertained his relations, acquainted the magistrate, and drunk manjanee, he cannot afterwards abandon the young man so adopted, in favour of another; nor is the adopted compellable to renounce the connexion so formed. The relation of adopted needs no writing for its support.

Remarks.

The answer presumes the adoption to have been actually made; and the circumstances stated authorize the presumption. It would be otherwise, if it were

proved that the party had changed his intention before the essential rites of adoption took place, and purposely avoided performing them. C.

This opinion is correctly applicable to all castes but Brahmins, with whom the *Datta-homam* is indispensably requisite to produce *spiritual* benefit. E.

ZILLA OF VENDACHELLUM.

May 5, 1808.

Siliamedoo Runga Reddy, *v.* Achummall.

Question to the Pundit.

(Ante, vol. i. p. 80. 95. 97.)

Narasummall, the widow, and her mother-in-law, the Defendant, entered into an agreement to adopt a particular boy; but the intended adoption not taking place, the widow, without the privity of her mother-in-law, subsequently adopted the Plaintiff.—Is an adoption, so circumstanced, good, notwithstanding the previous agreement?

Answer.

It is.

(Signed)
SREENEVASA CHARLOO, *Pundit.*

Remarks.

A simple agreement to make an adoption, not carried into effect, will certainly not invalidate a subsequent adoption, made with the requisite forms. The adoption of the widow was good, if authorized by her husband, or, in default of such authority, if with the requisite sanction of her proper guardians, her husband's male kindred. (Note on Mitacsh. on Inh. ch. i. sect. xi. 9.) C.

This appears perfectly correct, admitting either that the consent of the husband to adoption by the wife had been obtained before his decease, or that such consent is not necessary, where the parties are of a Sudra tribe. E.

That the adopted inherits lineally and collaterally in the family of the adopter, see vol. i. ch. iv. p. 97.

"This position is questioned—Passages in the *Dattaca* "*Mimansa*, and *Dattaca Chandrica* declare the relation- "ship of the adopted as *Sapinda*, to be special, extending "to three, not seven degrees. I regard the limitation "as referring to the oblation of funeral cakes, impurity "on occasion of deaths and births, and disability of "marriage, or, at all events, even under the limitation, "the adopted might collaterally inherit, within the third "degree, according to the mode of computation, for "which, see Note to Dattaca Mimansa, sect. vi. § 17.— "Those who oppose generally the collateral succession "of the adopted, appeal to the texts of Devala and "others, in which the twelve sons are enumerated in two "sets; and in respect to the second of these, in which "the son *given* is classed, terms are used, barring the "right of collateral succession. On the other hand, "Menu and Baudhayana place the son *given* in the first "set, thereby establishing his right. The authority of "Menu preponderates over that of Devala, and the rest;

"who, in fact, would give a preference to sons, ad-
"mitted to be exceptionable. The authority of the
"*Mitacshara* is also explicit, in favour of the collateral
"succession of the adopted son; which, indeed, is no
"more than what equity requires. Debarred from suc-
"cession in his *natural*, it would be unjust that the
"adopted should be deprived of that right in his ac-
"quired capacity."—H. C. SUTHERLAND.

ZILLA OF VIZAGAPATAM.

(Ante, vol. i. p. 75. 86. 100.)

Question to the Pundit.

Among the twelve sorts of sons, are not the *Dwyamushyayana*, &c. disqualified from inheriting in the present age? And, can any inherit in it but the *data* and *aurasa*, the adopted and the legitimate, natural born?

Answer.

The right of inheritance is restricted in the *Cali yug* to the two descriptions of sons specified in the question, in exclusion of the other ten.

PUNDIT APPIAH, *Sastree.*

Remark.

The "*Dwyámushyáyana,*" or son of two fathers, is a son begotten by an appointed kinsman. The practice is by most authorities admitted to be abrogated in the present age; yet it continues in all parts of India. Such a son succeeds to both fathers. Vijnyaneswara (it must be observed) admits the legal existence of the *Dwyámushyáyana* in this age. The appointment of a wife, or widow, to raise up seed he considers as forbidden by Menu, and consequently unlawful; and the term *Dwyámushyáyana* therefore is restricted by him to the son of a virgin, betrothed, but not espoused,

whom his author, Yajnyawalcya, directs to be espoused by the brother of the intended husband deceased. Such a son he deems legitimate; he is, according to him, *Dwyámushyáyana*, or the son of two fathers; and he succeeds always to the estate of the brother to whom his mother was betrothed, as well as to that of his actual father, if the latter have no other son. If the latter have male issue distinct from him, he is then not *Dwyámushyáyana*, but simply *Cshétraja*, son of the wife, and belongs exclusively to him to whom his mother was betrothed. As the custom of a brother marrying the betrothed of his deceased brother does not now prevail, the distinction made by Vijnyaneswara is of no practical utility. It is certain, however, that he considered the offspring of such marriage as legitimate; and he no where intimates that any of the other descriptions of sons became illegitimate in the *Cali-Yugam*. This is a fancy posterior in time to Vijnyaneswara. E.

ZILLA OF BELLARI.

June 9, 1808.

Hanumunta Bhutloo, *v.* Bhyrapah.

(Ante, vol. i. p. 89. 100.)

According to the Plaintiff's petition, one Bhagavendra Bhutloo, of the *Bhargava gotra*, some forty years ago, adopted the Plaintiff, then three years of age, being of a different gotra. It is stated, that his *Upanayana*, with every other corresponding ceremony, was performed for him in the gotra of the adopter; that his adoptive father dying a few years after, his funeral rites had been celebrated by the Plaintiff, who had, from that time to the present, enjoyed his property, with the privileges of an hereditary office (that of *Panchangi*(1) of his village) which had belonged to him. It farther states, that the time being arrived for the performance by Plaintiff of his son's *Upanayana*, the Defendant, being of the family of Bhagavendra, though separated from it in point of property, disputes its being performed in the adoptive gotra, insisting on its performance in his Janaca gotra, or the gotra of his natural ancestors.

The Defendant, by his answer, denies any adoption of the Plaintiff by means of *homams*, as well as the performance of his *Upanayana* by his alleged adopted father, Bhagavendra Bhutloo; and he alleges, that the

(1) Expounder of the *Panchagum*, or almanack.—Vid. post, p. 234.

celebration of the funeral rites of the latter by the Plaintiff was objected to at the time, by the ancestors of the Defendant. He then quotes a passage from the *Datta Mimansa* of Nanda Pundita, to shew that, if one of a different *gotra* from the adopter be adopted, his sons should revert to their parents' natural *gotra;* according to which authority, he justifies the opposition complained of by the Plaintiff. The uninterrupted possession by Plaintiff of the property and privileges of his alleged adoptive father is admitted by the Defendant.

The question is, whether the *Upanayana* for the Plaintiff's son should be solemnized in his adoptive, or in his natural *gotra?*

Answer of the Pundit.

Adoption is of two kinds, viz. *Nitya Datta*, and *A-nitya Datta*. The former, performed with *homams*, or offerings before fire, is permanent; the latter temporary only, being without the same formalities. The *Nitya Datta* is the preferable one, and, in the case of the son of one so adopted, his *Upanayana* should be performed in the *gotra* of his adoption. The *Upanayana* for the son of the *A-nitya Datta*, or temporarily adopted, is allowable either way; *i. e.* it may be performed in his adoptive *gotra*, or in that of his ancestor's original birth. It appearing in this case, that the adoption of the Plaintiff was by *homams*, in the presence of relations and of the god, his son's *Upanayana* should be solemnized in *Bhargava gotra*, being that of his adoptive father.

Remarks.

No doubt, the issue of an adopted son, of the description termed *datta*, regularly adopted, belongs, like him, to the same *gotra* with the adopter: and the ceremonies of initiation (*Upanayana*) are to be performed in that *gotra*, or family. I am not aware of any authority for holding that the issue of an *Anitya datta* may be initiated in either family. An adoption, which renders the party son of two fathers (*dwyámushyáyana*), is not unknown to the law. (See Mitacshara on Inh. ch. i. sect. x.) But, in such case, the issue remains in the same *gotra*, in which the son of two fathers received his *Upanayana*, or initiation. C.

This opinion is sufficiently correct. *Nitya datta*, and *Anitya datta*, distinctions made by some writers, are not improperly interpreted into permanent and temporary adoption. The *Nitya datta* neither returns himself, nor do any of his descendants return to the *gotra* of his natural father, but remain from generation to generation in that of the adoptive one. The *Anitya datta* does so return. He that is so adopted indeed remains, while he lives, in the *gotra* of his adoptive father; but his son returns to his original one. Describing the *Anitya datta*, Vidyaranga quotes the following text from the *Nernaya Sindhu*. "That son to whom the "prescribed ceremonies have been performed in the "*gotra* of his natural father, as far as the tonsure, does "not possess the full qualities of a son—he is a tempo-

"rary son only" *(Anitya datta).* The author quotes one of the *Vútiam* of *Satyáshádha*, which states the *Anitya putra* to be equivalent to the *Dwyámushyáyana*, or son of two fathers; and hence it follows, that he is to perform the funeral ceremonies of both fathers, the natural and the adoptive.

The result is, that *Nitya datta* is a son adopted from the same *gotra*, before, or after the ceremony of the tonsure; or a son adopted from a different *gotra*, *before* the tonsure; *Anitya datta* is a son adopted from a different *gotra*, *after* he has received the tonsure in his natural *gotra*. The performance of the tonsure is the cause of the temporary nature of the latter species of adoption. E.

ZILLA OF VERDACHELLUM.

Nov. 14, 1807.

Vasuntaroya, *v.* Kistruyer.

(Ante, vol. i. p. 101.)

The Defendant is sued upon a bond given by his natural father, being one of several sons who was given in adoption to a person not a party to the bond. The other sons, including the eldest, are living.—Is he liable to the action?

Answer.

An adopted is not liable for a debt contracted by his natural father.

(Signed)
SREENEVASA CHARLOO, *Pundit.*

Remarks.

Being no longer connected with the family, nor concerned in the estate of his natural father, (Mitacsh. on Inh. ch. i. sect. xi. 22.—Menu, ch. ix. 5. 14.) he cannot be held liable for his debts. C.

To the same effect by E.

ZILLA OF CHINGLEPUT.

M. Veneataroyer, *v.* Agusteapah Moodely.

(Ante, vol. i. p. 101.)

The Plaintiff sues for a debt due to him from Defendant's son, Soobaroya Moodely, who was long since given in adoption to Annah Moodely.—Is the action maintainable against the Defendant?

Answer.

The money borrowed by Soobaroya Moodely is not recoverable from his natural father, the Defendant, but his son will be answerable for it when he comes of age; unless it was borrowed for the use of the Defendant or his family, in which case the action is maintainable against the Defendant.(1)

Remarks.

This follows naturally from the entire separation of the son given for adoption from the family of his natural father. Mitacsh. on Inh. ch. i. sect. xi. 32. C.

(1) On the ground of the debt having been contracted by the adopted, not as a son, but as the agent of his natural father. This must be supplied, to give the full meaning of the sentence.—The opinion is correct. E.

ZILLA OF BELLARI.

Dec. 13, 1808.

Nursapah, *v.* Paupummall.

(Ante, vol. i. p. 97. 101.)

Upon a question of adoption, the Pundit of the Court reported as follows:

Answer.

It is held that, if a lad be adopted into a family, even where it is not the custom to perform *homam* (sacrifice of adoption), he cannot be turned out of it at will. Adoption imposes upon the adopter an obligation to educate and provide for the adopted as his son, and he succeeds as such upon the death of his adoptive father.

Remarks.

The inadvertent omission of an unessential part, as sacrifice is, even where it is enjoined, does not vitiate an adoption. 3 Dig. 244.

The adoption being complete, it cannot be annulled. An adopted son may be disinherited for like reasons as the legitimate son.—(Mitacsh. on Inh. ch. ii. sect. x.) but he cannot forfeit the relation of son. C.

Certainly :—however defective the ceremony, and however small in consequence the spiritual benefit, the act of adoption cannot be set aside, on any account whatever; *a fortiori*, not on account of any informality. E.

ZILLA OF VERDACHELLUM.

Dec. 30, 1807.

Raman, *v.* Cootya Padayanchee.

(Ante, vol. i. p. 80. 101.)

The Plaintiff having been adopted by a woman, had she, subsequently, the same dominion over her property that she had before, so that a mortgage of a house by her after would be good?

Answer.

The mortgage under these circumstances would not be good, to the prejudice of the adopted, if rightly adopted.

Remarks.

Presuming the property here spoken of as the woman's to have been what devolved upon her by the death of her husband, and not to have been her proper *Stridhana*, it ceased to be her's at the moment of a valid adoption made by her of a son to her husband and herself; in the same manner as property, coming into the hands of a pregnant widow, by the same means, cannot be used by her as her own, after the birth of a son. An adopted child is in most respects precisely similar to a posthumous son. From the moment of the adoption taking effect, the child became heir of the widow's husband; and the widow could have no other authority but that of mother and guardian. C.

Women have legally no right to adopt for the transmission even of their separate property; and this is founded both on authority and reason; it does not follow, however, but that such a custom may obtain in the caste to which the parties in this case appear to belong, namely, that of the *Pullcr*, nearly the lowest of the Sudra tribes. E.

ZILLA OF VIZAGAPATAM.

Question to the Pundit.

(Ante, vol. i. p. 101.)

If a boy that has been adopted die without issue, and unmarried, what becomes of the property of his adoptive father at his death? Does it go to the natural father of the adopted, or to the widow of the adoptive one?

Answer.

The widow succeeds to it by inheritance, as *legal* mother to the adopted.

(Signed) *Pundit* APPIAH, *Sastree.*

Remark.

The answer is entirely consonant to the law. The *dattaca* having been given away by his father, the natural relation was annulled, and his father would no more inherit from him, than he from his natural father.

C.

MASULIPATUM, PROVINCIAL COURT.

November, 3, 1803.

Cooty Verty Cootapah, *Appellant.*

Sambiah and Venkiah, *Respondents.*

(Ante, vol. i. p. 97.)

Questions referred to the Pundit of the Court.

1. Is it proved by the evidence given before the Zilla Court, that Basavannah, the father of Cootapah, the Appellant, was adopted by his maternal uncle, Moonta Satia Lingum?

Answer.—The adoption is not established, for want of the oblation to fire.

2. Is the declaration by a husband to his wife, that he had adopted a particular boy, sufficient evidence, if proved, of the fact?

Answer.—The husband not being at liberty to adopt, without the privity of his wife, a subsequent communication would not be sufficient to establish the fact of adoption.

3. Is it necessary for persons of the Sudra caste to make the oblation to fire, in adopting?

Answer.—It is ordained that the husband and wife, among the Sudras, should be present, and that they should cause a Brahmin to make oblation to fire.

(Signed) V. Narrain, *Sastree.*

Remarks.

"As to oblation to fire, the ceremony is prescribed; but the fact of its celebration may be presumed, if there be no proof to the contrary. The inadvertent omission of a ceremony would not invalidate the adoption. (Jagannatha's Digest, vol. iii. p. 244.) The wife must consent to the gift of a son; but it is not said that she must be privy to the acceptance of one.—See Mitacsh. on Inh. ch. i. sect. xi. 9. and the note on the words "whom his father or mother gives." A subsequent communication to the wife would be evidence, but not conclusive. As to the third point, the answer of the Sastree is the received construction.—See Jagannatha, vol. iii. p. 262. But the learned of Mit'hilâ contest the position." C.

The former of these answers, if (as by their names they appear to be) the parties in the cause are Brahmins, is correct. Not so the last; for the *Sastree* does not ordain that the oblation to fire should be performed by any one at a Sudra adoption, and this for sundry good and sufficient reasons. E

On the Legality, in the present Age, of the Crita, or Son *purchased* for Adoption.—Mit. on Inh. i. xi. 16.

(Ante, vol. i. p. 102.)

Extract of a Letter from Henry Colebrooke, Esq. to Sir John Royds, dated Calcutta, March 14, 1812.

According to the ancient Hindu law, purchase was one of the means by which a son might be had ready made. This easy way of getting a family was noticed in Menu, in Jagannatha's Digest, and in the Mitacshara; and some remarks on the law relative to it will be found quoted from other authorities, in the notes to the translation of the last mentioned work. It will be there seen, that the child so adopted must be of the same tribe with the purchaser, and a younger son of the seller; and the purchase must be expressly for the purpose of a son. No set form, nor any further condition seems to be requisite; but the adoption is *by* purchase, not *after* it. I dwell on this point, because I gather from Sir Thomas Strange's questions, that, in the case before him, the purchase is not shewn to have been made specifically as of a son. Sir Thomas asks, whether adoption may grow out of purchase, and whether purchase can *per se* entitle the child to consider himself as adopted? To these questions I should answer, certainly not. The buyer's actual design to *buy a son* must be shewn to have existed at the time of the pur-

chase; though no doubt presumptive proof of such concomitant will may be admissible, if direct evidence be unattainable.

On this side of India, adoption by purchase is obsolete, and considered to have been prohibited in the present sinful age of the world. The only practice analogous to it is the purchase of children by *Gosians*, *Sannyasis*, and other professed ascetics, for initiation into their order of devotion,(1) the disciple becoming the heir of the master. This however is not adoption, but a practice grounded on other provisions of the Hindu law, and on the peculiar customs of the mendicant tribes.

The *Datta Mimánsa* is no doubt the best treatise on Hindu adoption.

I observe in books which I understand to be of most authority at Madras (for instance, the *Smriti Chandrica)*, the prohibition of adoption by purchase is asserted. I imagine this mode of adoption must be obsolete there, as well as here.

(1) See Digest, iii. p. 276.

Extract of a Letter from Sir Thomas Strange to Henry Colebrooke, Esq., Calcutta, dated Madras, April 29, 1812.

(Ante, vol. i. p. 102.)

Sir John Royds was good enough, under date the 15th of March, to send me your letter to him of the 14th, on the legality, in the present age, of adoption, among the Hindoos, by purchase. My application to Sir John for information on the subject had reference to a cause depending in our Court. Your letter did not arrive till after the trial, with the substance of which you are about to be troubled. But I must request you first to excuse this direct address, without permission or warrant; a liberty which I can alone justify to myself, under the sanction of my friend Sir John, who will suppress my letter if it be improper, for which purpose I transmit it through him open.

The action was trespass by widows, against the young man claiming to have been adopted by their deceased husband. The question arose upon the justification, on which the Court thought that he had failed. But it was not so confident of this, as not to be open to conviction, upon an application to set aside the nonsuit that had been obtained, for a new trial; a rule for which having been granted, toward the close of our late term, and cause being to be shewn against it in the next, it will be desirable to be as well prepared as possible when it comes on again. With this view the liberty is taken of thus troubling you on the occasion.

Assuming the practice to continue legal in the Peninsula, you seem to think that though the transaction purports to be that of a mere sale and purchase, yet the design might be shewn by evidence; and I conclude your opinion to be, that adoption appearing to have been the object, the boy purchased would be entitled to be considered as a son. Though we had not the benefit of your judgment to guide us at the time, yet, averse to the exclusion of light, we admitted, as explanatory, an account of what was said to have passed at the time of the signing of the bill of sale, as well as of the acts of the deceased under it. Such evidence, upon the principles of our law, would have been liable to question; and, in fact, the counsel for the Plaintiffs reserved his right of protesting against it in the case before us, in the event of the verdict being against his clients. Enclosure B(1) is an extract of a letter which I wrote soon after to a judicial friend in one of our provincial courts, with a view to his conferring with his Pundit on the whole of the subject, and letting me know the result. I add it, as elucidatory of the trial. Our idea finally was, that, whatever had been in the contemplation of the parties, adoption never had in fact taken place, unless purchase was to be considered as constituting it. I have an opinion given in 1808, by the Pundit of the Zilla Court at Vendachellum, that an agreement to adopt is not an adoption; and, in that case, he held a subsequent adoption of a different boy to be good.

(1) Post, p. 140.

In the case under consideration, it was insisted for the Defendant, that the purchase was an adoption, on the ground that otherwise it must constitute *slavery*, the existence of which by law the Court would not recognize, and, at all events, not in the caste of the Banyans. If slavery be competent by the Hindu law, there was no evidence before us of sufficient force to exclude the possibility of it in the Banyan caste. That slavery exists by the Hindu law, cannot, think, be doubted. I have opinions that it does from living Pundits; and Sir William Jones (it is observable), in one of his charges, delivered June 10, 1785, however reluctantly, admits the fact, contending that it ought not to be tolerated but in a mitigated form, though, in the conclusion, it is true, he represents the sale of the human species as a traffic that had been condemned by the most respectable Hindoos in Calcutta, as repugnant to their Sastra. Supposing the evidence which we received to have been admissible, there seemed reason to believe that adoption had been in the contemplation of the parties; but, as it did not appear to have ever taken place, and as we did not conceive that the claim could stand upon the purchase alone, though coupled with an intent, such intent not appearing to have been otherwise ever carried into execution, we disallowed it, reserving, if necessary, the general question of the validity, at this day, of adoption by purchase.

Upon this point, I have had some correspondence since with Mr. Ellis, collector of Madras, whom I believe you know by character. He is personally known

to Sir John Royds. Enclosure, letter C,[1] contains extracts from it. He seems to incline to the opinion, that the mode is still valid in this part of India, excepting only among Brahmins. The text of the *Smriti Chandrica*, according to the extract accompanying one of his letters, declares it generally obsolete. But a reference to the *Datta mimamsa* (it seems) confines the prohibition to the *twice born*, which Mr. Ellis says must be taken now to mean only Brahmins. This remark is made in a "note," which I take to have been furnished by some of Mr. Ellis's people; it may be of questionable authority. I have consulted the Pundits of several Courts upon the coast; who, speaking (no doubt) with reference to the Peninsula, say, that it is not now legal, without entering into distinctions.

The *Mitacshara* (the prevalent authority with us) is silent upon the point, though it contains a chapter expressly on the subject. Permit me to draw your attention to this, since (as was to be expected) it was relied upon in the case before us, in favour of the Defendant. Admitting the practice to have been abrogated in your part of India, it was contended, on the authority of the *Mitacshara*, that such was not the case here. I have already had occasion to observe, how Mr. Ellis, between reference and construction, avoids the authority of the *Smriti Chandrica*, which, without reserve or distinction, restricts inheritance in the *Cali-yug*, to the son of the body, and the son *given*.

(1) Post, p. 148.

Translation of Bill of Sale, dated Shawena Bahoola Astamy, or 21st Auvany of Caulayoocty year, answering to A. D. September 1, 1798*;—referred to in Letter to Mr. Colebrooke, ante,* p. 134.

(Ante, vol. i. p. 102.)

I, Bavoory Chitty Vencataraumoodoo Chitty, and my wife Lutchemy, both of us, do jointly give this bill of sale to Jaldoo Sorbaroya Chitty, of Madras; that is to say,

We have sold to you our fourth son, or boy of four years of age, named Pedda Chinnacasavaloo, for the sum of (25) twenty-five star pagodas, current money of Madras; and having received the money, you have consequently a right to the boy; henceforward we have no connexion with him; you are to keep him according to your pleasure. There can arise no claim or controversy between us respecting him; should there occur any, we bind ourselves to release it, and to confirm him to you. In default whereof, we hereby engage to repay you the said principal sum of twenty-five pagodas with interest, together with the charges you may have incurred for him from this date. Thus have we both voluntarily given this bill of sale. Witnesses, Tagooramadoo Chinnasamy, Voopatoory Appanah Chitty, Mandauroo Govindo Chitty, and Chinna Venkiah

Chitty, with whose privity this bill of sale is drawn by Madary Soobarcyloo.

(Signed)

BAVOORY CHITTY VENCATARAUMOODOO.

Witnesses,

TAGOORAMADOO CHINNASAMY,

VOOPATOORY APPANAH,

GOVINDO,

CHINNA VENKIAH.

(Signed)

RANGANADOM, *Court Interpreter.*

[A true translation, as near as can be, from the Gentu language.]

Questions.

1. Is adoption by purchase legal in the present age, according to the Hindu law?

2. Supposing it to be so, does purchase alone constitute it?

3. If not, can it grow out of purchase, supposing adoption to have been intended, and the boy purchased to have been treated by the purchaser as his adopted?

4. Is B, according to the case as stated, to be taken to have been adopted, so as, A being dead, to be entitled to succeed to his estate, by right of adoption.(1)

(1) For answers to the above questions, vid. post, p. 154.

B.

Extract of a Letter from Sir Thomas Strange, dated March, 1812, *referred to in Letter to Mr. Colebrooke, ante,* p. 135.

(Ante, vol. i. p. 102.)

I EXPECTED from you, before this, the extracts you were so good as promise me from the Shaster, on the subject of adoption by purchase. In the mean time, our term having commenced, the cause in question has been tried and disposed of, subject to the right of the losing party to call upon us to review our opinion. The action was brought by two widows against the Defendant, who claimed as the adopted son of their deceased husband. His case was, that he had been purchased by the deceased some years ago of his natural parents, who had sold him on account of distress, for twenty-five pagodas; having previously disposed of two others in the same way, under similar circumstances. There was a deed executed on the occasion, of which I enclose you a translation. The mother of the boy swore that adoption was the object; that he had been bought and sold to be adopted, and that otherwise no consideration earthly would have induced her and her husband to have parted with him. Her husband did not attend, being said to be ill as well as aged; living at the distance of about thirty miles from Madras. There were other witnesses, who swore to the same effect, as to the intention and view with which the purchase was made; and it was proved that the boy

had been so far treated as a son, that he had been dressed, and ornamented, and sent to school as one; and had also accompanied the deceased on a pilgrimage, and had occasionally visited and been seen by his friends here, so dressed and adorned. It was further proved that, upon marriages, in the caste to which the parties belonged (being that of Banyans,) it was the custom for an officer of the caste, employed for the purpose, to carry balls of rice about to each family. That the practice was to give four balls to the head of each for all the members of his family (as contradistinguished from his servants,) or eight, if he happened to be one of the monthly members of the caste. The deceased was a monthly member, and had had eight upon these occasions. There was a servant in the family to whom the *Oomadee* (for so he is called) used to give four on the same occasions. It did not appear whether, had there been more in it, each would have received four, or whether four was the customary provision for all the servants. It was proved that, upon the young man in question becoming an inmate of the house, which he did at the age of about five, it made no difference as to the number of the balls given to and received by the deceased; inferring (as contended for the Defendant,) that he had been considered as his son. It was admitted, that no ceremony of adoption had taken place, at the time of the purchase, or after; as also, that, in the other two instances of sales by the parents of the boy in question, the regular ceremonies of adoption had followed. It was not pretended that the deceased

had ever called the boy his son, or introduced him to any one as his son; or that, in the space of fourteen years down to his death, there had been any transaction or communication whatever between him and the parents of the child, subsequent to the execution of the bill of sale, from which adoption could be inferred, as an act distinct from what might be considered as resulting from the treatment of the boy, coupled with the bill of sale. It appeared that, in the latter part of his life, the deceased's regard for him had ceased; that he had stripped, and occasionally punished him with ignominy; and finally left him to seek protection from another member of the family, for whom he had, in consequence of a misunderstanding, been recently providing a separate maintenance.

The Court agreed with the counsel for the Defendant, as a general proposition, that adoption was indefeasible, inasmuch as it deprives the adopted of the rights belonging to him in his natural family, and consequently that having once taken place, it was not competent to the person adopting, capriciously by any act of his, to deprive the adopted of his acquired rights, incident to adoption. But it thought that, under the circumstances of this case, the Defendant could not be considered as having ever been adopted. It took it, that the transaction having been reduced to writing at the time, it might be expected that adoption should appear upon the instrument, if such had been really the object; more especially, as it was not pretended, that any thing in the nature of adoption had followed its exe-

cution; since, otherwise, it would be to turn that which purported to be a mere dry bill of sale, into an instrument of a very different description, contrary to what the Court could, with any thing like confidence, see had been in the contemplation of the parties at the time; and that the danger of the interpretation contended for was the greater, in a case in which the claim was set up after the death of the owner of the estate, and person whose obsequies were to be performed, and attempted to be supported principally by the evidence of the mother of the boy, who had a manifest interest in getting it established. The Court was aware that, by the Hindu law, it was more than doubtful, whether the mother was admissible in this case; but the English law is not so rigid in its admission of witnesses; and, though we attend to their laws in matters of inheritance and contract, where natives are the parties, yet, so far as evidence only is concerned, we in general administer justice to them, in the Supreme Court, upon our own principles. Be the mode of adoption what it might, this seemed indispensable; that, at whatever time it was contended to have taken place, it should be shewn by the claimant, that the operative expressions had been used, indicative of the disposition to give, or to become adopted on one side, and to adopt on the other. The Hindu law has not prescribed any particular expressions on the occasion; nor does it require that adoption should be by writing. But it has provided, that the intent shall be expressed at the time; and, if the transaction be by writing, its whole genius and course

teaches us to look for it there. Neither is the performance of ceremonies essential to the validity of adoption, as conferring civil rights; and the want of them therefore could not be pleaded in bar to a claim of this nature; but it is undeniable that, with reference to it, considered as a merely civil transaction, they are of infinite consequence in point of proof; and it follows, that whoever insists upon a claim of the kind, has a difficulty in point of evidence to get over, no ceremonies appearing to have been performed; especially if the claim (as in the case before the Court) was founded upon a writing, from which it is far from being to be collected, that adoption had been in view. That there is a ceremonial for adoption by purchase, as well as for other modes of adoption, see the Mitacshara, p. 312.

(15.) It had been contended by the counsel for the Defendant, that the Court would presume any thing, and lean to any construction, rather than admit that a boy had been sold to be a slave, which it was also asserted was illegal in general, and without precedent in his caste. The Court, in answer to this said, it did not know that slavery was illegal by the Hindu law, in times of distress; but that, at all events, the practice was too notorious to admit of an argument being drawn from its illegality, against its existence in a particular case; that the question for the Court to decide was, whether the claim to *adoption* had been supported, in opposition to the claim on the part of the widows, which could not otherwise be disputed. That if it were not, the boy still remained the child of his natural pa-

rents; he could perform their obsequies; he would be entitled to share their estate, if they had any; and that, so far, no injury had been done him. That, should the widows insist upon other rights, and be advised to institute a claim against him, founded on the bill of sale, considered as a mere and absolute transfer of him to their deceased husband, it would then be time enough to inquire into its validity as such, and declare its legal effect.

Upon these principles, it seemed to the Court, that the fact of an adoption by purchase had not been made out, so as to raise the question of law meant to be agitated, as to the legal validity of such an adoption; and, upon these grounds, the claim of the Defendant was dismissed, without calling upon the widows to go into evidence to repel it. The trespass was proved, and the question arose upon the justification.

Had the deed purported to have been a deed of adoption by purchase, or could we have seen that such was its effect, the question remained, whether there can be an adoption of the kind, by the existing Hindu law.

The authority of the *Smriti* is express, that the filiation of any but a son legally begotten, or given in adoption by his parents, is a part of ancient law abrogated in the *Cali* age. See "General note" at the end of Menu, 6th ed. p. 365. It is said by Sir William Jones (same page), but not speaking of this text in particular, that the *Smriti* is quoted, without the name of the legislator; and, of all the prohibitory texts collected and arranged in that note, he remarks that none of them, except that of

Vrihaspati, are cited by Culluca Bhatta, his favourite commentator.(1) Vrihaspati then is admitted to be an authority, having received the sanction of Culluca. But Vrihaspati (in *loc. cit.)* mentions the distinction between the three first ages and the fourth, with reference to the mode of acquiring sons; observing, "Thus were sons of "many different sorts made by ancient sages; but such "cannot now (he says) be adopted, by men destitute of "those eminent powers."—Is it not most reasonable to think, that he meant should be understood here, what is by others more distinctly expressed, namely, an interdiction, in the present age, of all but the son lawfully begotten, and the son given in adoption, *i. e.* the chief of each set, according to a distribution made by some of the Hindu Jurists, into sons proper, and improper; in other words, sons by birth, and sons by adoption? The *Adityapurana* is equally express on the subject with the *Smriti*. See Dig. vol. iii. p. 272, 8vo. ed. sect. viii. "*On the Son given;*" and, I think, subject to other lights, we must consider the law as well summed up under the title "On the Adoption of Sons;" sect. xv. p. 289, same vol. where is stated that, "among these twelve descrip- "tions of sons, we must only now admit the rules con- "cerning a son given in adoption, and one legally be- "gotten;—observing that the law concerning the rest "has been inserted, to complete that part of the book; "as well as for the use of those, who, not having seen "such prohibitory texts, admit the filiation of other "sons."

(1) See preface to Menu, p. 14.

I have troubled you a good deal; and had no idea when I sat down of saying so much on the subject. After all, I have given only the outline of a long trial; though I do not believe I have omitted to mention any material circumstance. I wish you could be at the pains of stating to your Pundit (by way of conference) what I have said, and of letting me know how far he thinks we have been right, if you have sufficient confidence in him for such a communication.

C.

Extracts of Letters from Mr. Ellis of Madras, to Sir T. S., referred to in a Letter to Mr. Colebrooke, ante, p. 137.

(Ante, vol. i. p. 102.)

NEITHER Vijnyaneswara nor Jimuta Vahana (a translation of whose work also you have got) make any very particular mention of sons purchased. They enumerate the twelve descriptions of sons in the usual way, and make the customary distinction between those who are heirs, and kinsmen; and those who are heirs, but not kinsmen; among the latter is included the son purchased: so that the right of succession in this description of son is fully admitted by these authors. Vijnyaneswara prescribes a certain ceremony for adoption, such as assembling kin, informing the king, &c., which he states as equally to be observed with respect to a son purchased.

In the Digest, translated by Mr. Colebrooke, Jagannatha states (I believe) that, in the present age, certain descriptions of sons, and, among the rest, the son purchased, are not lawful. He is at variance here with the above mentioned authorities, and with practice; for, with some castes in this part of India, the mode of adoption is uniformly by purchase. Among others again, the Brahmins for instance, this and other modes are not customary. Jagannatha's statement, therefore, should not be received without limitation.

I am afraid you will think me negligent, in not send-

ing you before the extracts I promised respecting the son purchased; it has arisen wholly from my not having been able to procure a perfect copy of the Smriti Chandrica, until Saturday.—My copy of the Madhavijam I have mislaid; and I cannot find another at Madras; but I have, beside the Smriti Chandrica, made extracts from the Datta Mimansa, and other works within my reach.

The principal point in question respecting the son purchased, namely, whether the act be lawful in the present age, is not made very clear by these extracts; though, taking them altogether, the inference seems to be, that it is forbidden to Brahmins only. This depends on the meaning of the word *Durjate* (twice-born); which, in former ages, included Brahmins, Cshatriyas, and Vaisyas; but, in the present, is generally understood to be confined to Brahmins, these only performing the *Oopanayanum*, or ceremony of tying on the sacrificial cord; whence the second birth, with the texts of the Veda.

If the legality of the act in purchasing a son be admitted, the extracts shew sufficiently his rank, and the share to which he is entitled.

Translations of Extracts from various authorities relative to a son purchased; accompanying Extract of Letter from Mr. Ellis, ante, p. 148.

(Ante, vol. i. p. 102.)

1.—Datta Mimansa.

The taking of any of the twelve descriptions of sons, except the adopted son, and the son of the body; human and equine sacrifices; and intoxicating liquors, are to be avoided by twice-born (*Durgati*, Brahmins) in the Caliyuga.

2.—Brihat Guatama.

Those who become made, adopted, *purchased*, shall belong to the *gotrum*, (tribe,) but not to the *sapendya*, (kindred,) of their adoptive father.

3.—Brihan Menu.

Text.

The *sapindata* (connexion of kindred) between sons adopted, *purchased*, &c. and the sower of the seed, (the natural father,) is like that of kinsmen in the fifth or seventh degree; but the *gotrum* is that of their protector (adoptive father).

Commentary.

"The sower of the seed." There is indeed the *sapindyam* (relationship) of matter, blood, and body of

the procreator, but not the *sapindya* (relationship) of *gotra* (tribe,) in like manner as a virgin, whose *gotra* (tribe) is according to her father's genealogy, but her *santati* (affinity) is with him who has received, or protected her.

4.—Gautama Dharma.

Note.

The Text and commentary are jointly translated.

The son of the body, or the son whom his mother conceived by connexion with another man by order of her husband, or a son who has been adopted, or a putative son, or a son conceived by his mother in adultery, or a son rejected by his natural parents,—all these sons are entitled to the estate of the person who has adopted them; they are likewise said to be of his *gotrum.*

A son born of an unmarried girl, or one conceived by a woman before, but born after marriage, or a son by a twice married woman, or a son born of an appointed daughter, or a son self given, or a son *purchased,*—these sons are said to be of the same *gotrum* with that of the person who has adopted them, &c. but they are not entitled to his estate.

If, of the twelve descriptions of sons, the first do not exist, the second is entitled to the estate of the adopter, and also to offer the *pindah* in his name; and so of the rest.

5.—Smriti Chandrica.

The taking of any of the eleven descriptions of sons following the son of the body, was admitted in the former ages; but, in the Caliyuga, the adopted son only; as in the text beginning, "The taking of any, "except the adopted son, and the son of the body," which prohibits the taking of any of the rest in the Caliyuga. The substituting of a daughter for a son is also prohibited, being included among those rejected in the Caliyuga. Thus it is to be observed that, in the event of the failure of either the son of the body, or a grandson, a man may adopt a son, but not take one of any other description.

Note.

As the Smriti Chandrica goes expressly on the authority of the text of the Datta Mimansa, the first in these translations, it ought to be considered, though worded generally, as applying only to the twice-born, Brahmins, to whom it is limited in the second number of that text.

Extract of Letter from Mr. Colebrooke to Sir T. S., dated Calcutta, May 18, 1812.

(Ante, vol. i. p. 102.)

I HAVE been favoured with your letter of 29th April, (1) and have great satisfaction in communicating to you all the information I possess on the questions of Hindu law, to which it relates. I beg you would at all times command me, without scruple or hesitation, and consider any apology for doing so as entirely superfluous.

I now forward my answers to the questions on the case of the alleged adoption by purchase, and on that of a will by a Hindu of an undivided family, as well as upon slavery.

From the extent of research on the first question, which I observe in the papers you were so good as to send to me, I conclude you will not be averse to be troubled with a large collection of passages, on the points of Hindu law, which have engaged the attention of your Court. I shall accordingly transmit copies of numerous, and copious extracts, from legal authorities, to which I have referred in a general manner in my answers. I fear they may not be transcribed in time to accompany this letter, which I am unwilling to keep back, as you desired an early answer. They shall however be forwarded in a few days, and may perhaps reach you before the causes, depending in the Court, come on in the next term.

(1) Ante, p. 134.

Accompanying Letter from Mr. Colebrooke, of 18th May, 1812.

(Ante, vol. i. p. 102.)

Question 1.

Does purchase alone amount to adoption? or can adoption grow out of it?

Purchase alone does not, I apprehend, amount to adoption. To constitute adoption by purchase, there must be an express, and specific acceptance of the boy as son, the child being surrendered by his parents in consideration of a price paid. The following extracts from my collection of passages of law, relating to this form of adoption (copy of which I enclose), appear to me to declare that very distinctly:

"A child, sold by his father and mother, and re-"ceived as issue, is a son bought." Sulapani. Com. on Yajnyawalcya.

"The son bought is son of him by whom he is pur-"chased, that is, by whom he is taken with the will, "*let this be my son.*" Nanda Pundita. Com. on Vishnu. (Author likewise of the Datta Mimansa.)

From these passages, joined with the direction in Vijnyaneswara's Mitacshara, that the same forms of publicity are to be observed in this, as in the adoption of a son given, it seems to follow, that the child should be received with the purpose publicly declared, or distinctly manifested, that the child shall *thereby* become son to the buyer. The mere intention, that the child

now purchased shall be adopted at a future time, not being followed by actual fulfilment of such intention, cannot constitute adoption; nor could a purchase, which was made with a different design, be converted into an adoption of this sort by subsequent acts.

The essence of adoption by purchase is a sale on the one part, and a formal acceptance on the other, *as of a son;* in the same manner, as the essence of the adoption of a son given, (which is the common form,) is the gift on the one side, and the formal acceptance of the child as a son on the other: and the rest of the ceremonies prescribed are the same in both forms of adoption, and may be completed in pursuance of the adopter's intention, by others for him, if he should die prematurely The unintentional omission of some part of them by the adopter would hardly invalidate the adoption; *though the wilful omission of the whole by him might have that effect*:(1) since the performance of the ceremony of tonsure, and other rights, in the family of the adopter, is indispensable to the completion of the adoption in the one form, and must, I conclude, be held to be so in the other; conformably with the doctrine of Vijnyaneswara, concerning the observance of similar forms in these various modes of adoption. I think it right, however, to observe, that, in the kindred case of the *Critrema,* or son made, the mode of adoption, as practised in those of our provinces in which it prevails, is very simple; being completed by the declaration and consent of the parties, without any religious ceremo-

(1) Ante, vol. i. p. 93.

nies. The Dattaca Mimansa, on the contrary, holds the performance of these rites to be indispensable in the instance of the *Critrema*, as well as the *Dattaca*, both which forms of adoption that author considers to be now legal; and the omission of them by the adopter reduces the child to the condition of a slave. Under this exposition of the law on this point, the same must be affirmed concerning the *Crita*, or son bought, if this be considered as a mode of adoption now lawful, since this writer's authority is recognized in the South of India; the religious rites must be then admitted to be essential to an adoption by purchase.

Question 2.

Is adoption by purchase legal, according to Hindu law, as it prevails in the Peninsula of India?

I should not hesitate to pronounce it illegal, were it not for the information furnished by Mr. Ellis, that, with some castes, in that part of India, the mode of adoption is uniformly by purchase. It is true, as remarked by Mr. Ellis, that Vijnyaneswara, in the Mitacshara, does not declare this, and certain other modes, to be now unlawful; but numerous authorities, including the best commentaries on that work, concur in affirming its illegality. I enclose a collection of passages relative to this point, which clearly establish it. The author of the Datta Mimansa, whose quotation of a passage concerning its unlawfulness in the case of a Brahmin, or twice-born man, is relied upon by Mr. Ellis, as a restriction of the prohibition to that tribe,

and who was himself a commentator on the Vijnyaneswara, has expressly treated the question, both in the Datta Mimansa, and in his Commentary on Parasara; and explicitly declares, that any other adoption but that of a son given, or of a son made, is prohibited; no other sons but these, besides legitimate issue, being permitted in the present age: and he marks no distinction of tribe, nor restricts the rule to the Brahmin, or the twice-born. I think there must be some error in the quotation in question. But not to trouble you with a critical disquisition on the passage, I will state my reasons for thinking so in a separate memorandum, to be communicated, if you think proper, to Mr. Ellis;—for whose knowledge and acquirements I have a great respect.

In the accompanying collection of citations from authors, some will be found (but not of writers whose works are received in the South of India), which admit the adoption by purchase to be still lawful: and, if the practice do actually prevail, as a received and acknowledged custom, in any part of the territories of Fort St. George, it must rest on some such reasons as are given by the authors here alluded to.

However, from the answers of the Pundits of Chittoor, and Vendachellum, and even Trichinopoly, I should certainly conclude, that adoption by purchase was not understood to be lawful in that part of India. The first expressly say it is not; and the latter converts this into the common adoption, viz.—that of a son given, by turning the purchase money into a present. It argues,

I think, his conviction, that adoption cannot be simply by purchase, as the law now stands.

Question 3.

Admitting adoption by purchase to be legal, is B, according to the case as stated, to be taken to have been adopted by A, so as to be now entitled to succeed by right of adoption to his estate?

There is no proof of actual adoption. The bill of sale is no evidence of it; on the contrary, the tenour of that document is incompatible with the supposition that adoption took place at the same time with the purchase. The testimony of the mother, even if credit be given to what she deposes, does not go to an adoption; but to a promise of adoption to be made at a future period. From the facts, as stated, it is highly probable that the purchaser did entertain at one time an intention of adopting the boy, but afterwards changed his intention, and never did perform any of the ceremonies attendant on adoption, or consequent to it, nor ever did declare, in an express or formal manner, that he took the boy as his son. B, therefore, cannot be considered to have been adopted by A, nor be entitled to succeed by right of adoption to his estate.

Accompanying Letter from Mr. Colebrooke, May 18, 1812; *ante*, p. 153.

(Ante, vol. i. p. 102.)

I APPREHEND there must be some mistake in regard to the passage quoted by Mr. Ellis from the Datta Mimansa. In two copies of Nanda Pundita's Datta Mimansa in my possession, one procured at Benares, the other in Bengal, the texts cited by the author are,

1st. *Vrihaspati.* " Sons of many different sorts were " adopted by ancient sages; but such cannot now be " adopted by men destitute of those eminent powers." 2nd. *Saunaca.* " The taking as a son any other but " the son given, and the real son;" " *Dattaurasetare-* " *shautu putratevina pangrahah.*" The sentence is left incomplete in both my copies, and is not followed by the words which Mr. Ellis translates " Human and " equine sacrifices, and intoxicating liquors, are to be " avoided by twice-born in the Cali-yug!" The hemistick above-cited from Saunaca is the same, which is quoted without the author's name in the Smriti Chandrica, and is part of a very long passage of Saunaca, consisting of many stanzas inserted at full length in Nanda Pundita's Commentary on Parasara; (ch. i. v. 33.) enumerating various practices authorized in former ages, and forbidden in the present; but containing no restriction of that prohibition to any particular tribe. The author had, a few lines before, cited from the Brahma purana, the same stanzas which are quoted in the note

to Sir W. Jones's translation of Menu from the Anditya purana, and which terminated with the following hemistick; the sacrifice of a man and of a horse, and intoxicating liquors, are to be avoided by the twice-born in the Cali age? "*Narasiva medhan Madyancha Calan*" *Varjyan Devijatilhah.*" In commenting on the passage of Parasara, which gives occasion for these quotations, and which expresses that blame is not to be imputed to the twice-born, for practising in former ages observances which were then authorized, the commentator adds, "Nor to the *Sudra*, and other tribes;" which shews that he understood the inferior tribes to be affected by the general prohibition, against practices formerly observed, but now forbidden.

In afterwards commenting on the passages cited by him, containing such prohibitions, he considers that which relates to intoxicating liquors, as intended to forbid the use of all sorts of inebriating liquors to the three twice-born tribes, or rather to six tribes including the *Murdhavesuta*, and others born in the direct order of classes, excluding therefore from this particular rule the *Sudra*, and inferior tribes. In his subsequent comment on the passage concerning adoption, he notices no restriction of caste, but states the rule as a general one; and quotes Vrihaspati's authority, in confirmation of Saunaca's.

From these circumstances, I am led to think, that a line taken from the Parasara above mentioned, had been interpolated immediately after the passage quoted from Saunaca, in the copy of the Datta Mimansa which

Mr. Ellis used; and that the author of the Datta Mimansa does not consider the prohibition of adopting other sons but the *Dattaca* and *Critrema*, as confined to the Brahmin, or twice-born; but as extending equally to all the Hindu castes.

Extract of a Letter from Mr. Ellis, to Sir T. S., dated June 8, 1812.

(Ante, vol. i. p. 102.)

I HAVE been favoured with your note, enclosing Mr. Colebrooke's paper.

If you will have the goodness to return me the extracts I sent, (of which I have no copy,) I will refer to the original, and endeavour to verify the text to which Mr. Colebrooke objects. In usage of caste, in general customs, in religious acts, the mode of conducting the religious ceremonies, &c. &c. the *Draveda*, or south-western division of India, differs so much from the *Gauda*, or north-eastern, that, if additions or variations are, on comparison with the *Gauda* copies, found in the *Draveda* copies of books of authority, they ought by no means to be lightly received as interpolations, or mistakes; if supported by the coincidence of a number of copies, they constitute, if they occur in law-books, the law of *Draveda*, however it may differ from that of *Gauda*. The reason of this is not difficult to ascertain. The Brahmins, in introducing into this part of India, their laws and religion, were obliged in many things, to conform to the opinion of the aboriginal inhabitants, though in many instances immediately opposed to their prejudices; hence the Sudra high priests, in most of the *Siva* Pagodas on this coast, the indiscriminate female intercourse, and succession in the female line in Malabar, the primogeniture succession to landed estates among

the *Velmawon*, and other northern tribe, the exclusion of widows from succession even among the Brahmins; &c. the truth being, that the law of the *Smritis*, unless under various modifications, has never been the law of the Tamil, and Cognate nations.

Paper by Mr. Ellis, communicated August 16, 1812, *in answer to Mr. Colebrooke's paper.*

(Ante, vol. i. p. 102.)

The following observations, on the subject of Mr. Colebrooke's paper, are offered with all the deference due to his superior knowledge, and, indeed, after the opinion he has expressed, would not have been offered at all, did I not believe it will be found, that, in the *Draveda* division of India at least, not only the strict letter of the law is frequently superseded by local customs, but that the propriety of these variations are systematically defended, and the argument in support of them, ready in the mouths of all here, who consider themselves lawyers. This argument, as far as it is applicable to the present question, I shall here state.

It is admitted by all, that, at the commencement of the Cali yug, many laws before prevalent were repealed, lest, in this sinful age, they should become the cause of criminal actions. The most prominent, among these, is that remarkable provision, in which both the ancient Jewish and the Hindu laws nearly coincide, namely, the appointment of a widow "to raise up seed" to her husband, by the instrumentality of a near relation. This all agree to be abrogated by law, and to be now illegal in practice; the purity of primeval ages having ceased, its tendency is evident; it requires no argument to disecuntenance it, since none could make it clearer than it is at the first glance.(1)

(1) Ante, vol. i. p 39.

But, though this be admitted, there are some prohibitions, that relate to acts from which neither breach of morality, nor even irregularity, as regards ceremonial rites, can be inferred; and these, by common consent, are not considered imperative. The cases usually cited are,—

The immolation of the victim, and the preparation of its flesh by Brahmins.

Sale of the *Soma* vine by Brahmins.

Performance of pilgrimage to distant places, by a householder.

Intermarriage with the daughter of a maternal uncle.

These are all prohibited; yet, notwithstanding the two former are known to be generally practised, the third is thought to be meritorious: and, with respect to marriage with the daughter of the maternal uncle, so contrary is the practice to the precept, that the intermarriage with such a relation, if she exist, is considered incumbent.

Whence then shall it be said, seeing that universal practice is against it, that the prohibition contained in the text, *Dattauras itareshantu*, is more binding than any of these? It cannot be assimilated certainly to the text, *Vidhavayah prajotpataw devarasyaniyjoanam*, relating to the appointment to raise up seed; for what are the immoral and pernicious consequences which may be expected to result from it? If it be not meritorious like the performance of distant pilgrimages by domestic men, nor incumbent, like intermarriage with the daughter of a maternal uncle, it is at least indifferent, like the

immolation of victims, or the sale of the *Soma* vine by Brahmins.

Again, let us see if there exists in point of morality or policy, the same ground to prohibit the son purchased, as for the prohibition of other descriptions of sons, to whom the text appears to relate, With regard to the *Cshetraja*, (the seed raised up to a husband,) it is included in the general argument above. The admission of the *Sahodajah*, (son of a pregnant widow,) and of the *Caninah*, (son of an unmarried girl,) to equal privileges with sons of the body, and adopted sons, tends evidently to encourage want of chastity in women. That of the *Pannarbhavah*, (son of a twice-married woman) has a like tendency to alienate the affections of women from their husbands, and to encourage the abomination of second marriage. To admit the *gód'hatpana*, (son of unknown birth) leads to confusion of castes, and, by consequence, the subversion of the established order of society;—while, to legalize the *Swayandattah*, and *Crutrimah*, (son self-given, and self-sold,) is to encourage filial disobedience.—The immoral or pernicious tendency is clear in all these instances; (1) but, how is it so with regard to the *Crita*, and other descriptions of prohibited sons? Can it be said that avarice is encouraged by the purchase? The objection, applicable at all only to the natural father, is removed, by considering the price in the nature of a conciliatory present, such as is, upon several analogous occasions, enjoined by the law.

From this examination, it appears, that, as opposed to

(1) See the enumeration, post, p. 174.

other questionable modes of filiation, the one in dispute is unobjectionable; so that, though there should be no authority for it beyond custom, it should be admitted, upon the principle of the old law, provident as it was against the failure of sons.

In the foregoing sketch, the argument is confined to the question respecting a son purchased; but it is applicable, *mutatis mutandis*, to a variety of other points, in which the practice of the various tribes of *Draveda* differ from the received law, as contained in the Smritis or their commentaries. It would be difficult to enumerate all the practices not merely unsupported by, but, as here assumed, in direct contradiction to, the law of the Smritis. Among the more prominent are, 1. The indiscriminate intercourse of females, consecrated by the marriage rite, with all males of equal or superior caste, and other customs prevalent in *Malayalam*, said to have been introduced by *Sancaracharya*. 2. The admission of primogeniture (though the preference of the elder son in the Caliyuga be forbidden) with respect to landed estates, to which regalities are or were attached.(1) 3. The division of estates, in case of one person having several families by different women, among the families in equal shares, without reference to the number of persons in each.(2) 4. The exclusion of females from inheritance, according to the prescribed order of succession, &c. &c. These instances, and others relating to the conduct of religious ceremonies, and the superintend-

(1) See vol. i. p. 198.
(2) See vol. i. p. 205.

ence of religious establishments, in which the inferior castes are allowed to assert a pre-eminence over the Brahmins, clearly prove, that though the latter were successful in extirpating the aboriginal religion of the South, (that of the *Samner* or *Jainer)* they succeeded but partially in introducing the laws of the Smritis, and were obliged to permit many inveterate practices to continue, which they found it impossible to abolish. That they should have endeavoured since, by construction, to bring them within the pale of the law, is but an instance, among a thousand, of their characteristic sophistry; and, under similar circumstances, is all in the customary course of human nature.

I shall, in conclusion, venture to make some remarks on Mr. Colebrooke's memorandum.

The first quotation in my former paper was not, as Mr. Colebrooke apprehends, from the Datta Mimansa(1) of *Nanda Pundita*, but from that of *Vidyaranya Sevami*, the author of the Madhaveyum, and the principal authority in this part of India; as he may be said, with great propriety, to be the lawgiver of the last Southern Hindu Dynasty (that of *Vidyanagara*). The text *Dattaurasa*, &c. is found in this work in the *Datta Hama Pracarana*, the chapter on religious rites to be performed at adoption; the whole of which being, with the *Vaidica*, not the *Pauranica* texts, can, according to *Dravida* notions, apply to *Brahmins*, or, at most, to them, and *Cshatriyas* only. This *Pracarana* concludes thus: *Etadaswagotra*

(1) Numerous works bearing this title are found in Southern India; many of them of very recent composition.

putra grahana vishayum Dattaurasa, &c. Thus is particularized the ceremonies required on adopting a son, not of the same *gotrum*. Then follows (without the name of the author) the text I quoted, with the final hemistick, and another respecting real and personal property; throughout the *Pracarana*, the performer of the rite has been considered a *Devijati;* and, to such, the concluding sentence, above quoted, shews it to be restricted, by the use of the word *gotrum;*(1) for, with respect to these who are *Devijatis* (and, in *Dravida*, Brahmins only are so), there is no distinction of *gotrum*. By thus introducing the text, therefore, there can be no doubt but that the author, who wrote in recent times, and in Southern India, understood it to be restricted to Brahmins. So, indeed, from its collocation, it must have been intended to apply, had he even omitted the last hemistick.

On reference to a correct copy of Nanda Pundita's Datta Mimansam, procured at Madras, I find the text quoted, as stated by Mr. Colebrooke from Bruhaspati— *anècadah crutah putra*, &c. sons of many different sorts, &c. in the section relating to the Caliyuga; but *Saunaca* is not mentioned; so that the text *Dattaurasu*, &c. which follows, appears also to belong to the former author, and the second hemistick of the verse *Naraswamedhau*, &c. occurs as part of the quotation. This shews the variation in the copies in use here, and

(1) The intention of the rite is to convert the son adopted from the gotra of his natural, to that of his adoptive father. If he be of the same gotra, the ceremony is not requisite.

in the north-eastern districts of India; but it in no manner affects the general question; as Nanda Pundita, who goes on to state the legality of a reception of the several descriptions of sons denominated *Paunarbhava*, son of a twice-married woman (here an utter abomination), is no authority whatever in *Dravidam;* and, as no doubt can exist that this author intended the whole of his treatise to apply only to *Devijati* in its more extended signification, this he positively declares further on, in the section relative to the marriage of adopted sons, in a remark he attaches to a text quoted from Vijnyaneswara. The passage is as follows:—" *Mátur yed agré jayante* " *divitiyam maunjya bandunàt. Bráhmana, Cshatriya,* " *Visas-tasmad été devija Smriiti. Iti sudrasya cha ecam* " *eva jannách chhudrasya datta putrò nàsti."* — *Text:* From their mother first; and, secondly, by tying on the sacrificial cord, Brahmins, Cshatryas, and Vaisyas, are said to be twice born. *Commentary:* Thus, as there is but one birth to the Sudra, there is no adopted son to the Sudra. (1)

It cannot now, I think, be maintained, that the latter hemistick of the controverted text is, as supposed by Mr. Colebrooke, in the last paragraph of his memorandum, interpolated. I have not been able to ascertain precisely the author of this text, as I cannot procure the second *Cándom* of the Bruhaspati, nor any part of the Saunaca Smriti; but, whether this hemistick be to be considered as originally a *Smarta*, or a *Pauránica* text, certain it is that it forms part of many

(1) Ante, p. 89.

verses besides that in question, where interpolation cannot be suspected; in addition to that referred to by Mr. Colebrooke, as translated by Sir William Jones, from the Smriti Chandrica, *Matru Sapindat*, &c. the following, from the *Turiyasrama Depica*, a treatise by Narainasrama Swami, on the fourth state (as allowed in the present age), is another example. "*Mámsena* "*paitriica vid his sanyáso gósavas tadhà. Naràswa-* "*meadhan madyancha calan vèrjam devijatibheh.*" The performance of the rites to ancestors with flesh, the sacrifice of a cow, a man, or horse, &c. Here also the author is not stated. Similar variations in works relative to law or religion, if found, in collation, to prevail in the generality of copies, in use in the Northern or Southern provinces of India, are not to be attributed hastily to interpolation; as all manuscripts are easily interpolated, so they are greatly liable to it, and ought to be suspected, if private interest can be supposed to have operated; but differences of the nature here alluded to are intentional and systematic, and should be received as correct readings, as they apply, whether to *Gauda* or *Dravidam*.

With respect to the actual law in the present age, as to a son purchased, the greater number of positive authorities may, perhaps, be in favour of the exclusion of this description of son; it may be observed, however, that neither in the Mitacshara, nor the Madhaviyam, is the prohibition noticed; and that in the *Lohitah Smriti*, considered of special authority in this age, it is not only positively allowed, but rules are laid down for the

practice of it, in the very chapter which treats of inhibitions in force in the *Caliyuga*. After enumerating various actions prohibited in the present age, some of which, such as polygamy, are in direct contradiction to universal custom, Lohitah proceeds:—"*Evam ádini ch' ànyáni Carmáni*," &c. These, primarily, and other actions, are not to be done on the earth in the Caliyuga, as they (the authors of the Smritis) have declared them not to be lawful. In this predicament stand twelve out of the fifteen descriptions of sons,(1) and among these especially the *Cshetrajah*, or him begotten by another person on one's own wife. *Datta petrubhyàm Dattàchya*, &c. He who is given by his parents is called a son given, and he is of two kinds; namely, he given from desire of emolument, and he given without such desire: among these, in case a son of the body should be afterwards born, the former shall share a fourth part, but he who has been given to his adoptive father by his parents, uninfluenced by the desire of gain, shall share equally. *Vicritah cadhetas chaivam*, &c. He is called a son sold, who is sold by his parents, or those who represent them, as by an elder brother, who directs the family affairs; by a father's younger brother; by a paternal grandfather, or his wife; and by a maternal grandfather. "*Swa-*"*yamcritas tu cadhitah putrah Criitrimah Sanjnyicah*," &c. A son sold by himself, is said to be designated by the term *Criitrimah;* he, and the son self-given, that is, given by his own mere motion, as they themselves seek support, are condemned.

(1) The author, in his work, enumerates *fifteen* descriptions of sons.

Accompanying is an extract from the Lohitah Smriti, being the commencement of the section entitled *Caliyuga Nishedam*, and containing the whole passage relative to the several descriptions of sons to be received, and not to be received in the present age; it will enable Mr. Colebrooke, should he be so inclined, to ascertain whether any difference exists between the *Gauda* and *Dravida* copies of this work, as very possibly is the case. The extract was transposed into the *Nagari*, from a copy in the *Tinugu* character.

The several descriptions of sons mentioned in the Extract are:

Cshatrajah	2 kinds
Gudhajah	2 ditto
Caninah	1 ditto
Caninah, or Durjanih	1 ditto
Paunarbhava	2 ditto
Dattah	1 ditto
Critah	1 ditto
Crütrümah	1 ditto
Swayendattah	1 ditto
Sahodhajah	1 ditto
Apaviddhah, or Crütacrütah . .	1 ditto
Atmajah	1 ditto
Dauhitrah	1 ditto

Sixteen, or considering the two last the same, fifteen. If from the former number twelve be rejected, according to the first paragraph of the extract, four remain as lawful sons, which are Atmajah, Dauhitrah, Dattah, and Critah.

Extract of a Letter from Mr. Colebrooke to Sir Thomas Strange, dated September, 1812.

(Ante, vol. i. p. 102.)

I WAS favoured with your letter of the 11th and 20th of last month; and enclose a short memorandum,(1) in answer to Mr. Ellis's observations, which I have confined to the point of law, without farther discussion regarding the accuracy of the quotation which I questioned. I still think it wrong, though found, as Mr. Ellis has ascertained, in the copies of treatises on adoption used at Madras. But the point of law is not affected by it in my opinion.

I think it pretty clear that adoption by purchase is by law forbidden in the South of India, as in other provinces; and that no established usage to the contrary can be shewn to exist; and that, in the particular case before the Court, the child was not adopted by the purchase made of him; and that the intention which rather appears to have been at one time entertained of adopting him, was given up in consequence of displeasure conceived against him, without having been even partially carried into effect.

Your apprehensions of the possible effect of local influence on the Pundits of the Sudra Adawlut, at Madras, seem to have been but too well founded. A bias is obvious throughout their answers. They make great use, I perceive, of the authority of Jagannatha,

(1) Post, p. 176.

the compiler of the Digest, which was translated by me. We have not here the same veneration for him, when he speaks in his own name, or steps beyond the strict limits of a compiler's duty: and, as his doctrines, which are commonly taken from the Bengal school, or sometimes originate with himself, differ very frequently from the authorities which heretofore prevailed in the South of India, I am sorry that the Pundits should have been thus furnished with means of adopting, in their answers, whatever doctrine may happen to be best accommodated to the bias they may have contracted: and I should regret that Jagannatha's authority should supersede that of the much abler authors of the Mitacshara, Smriti Chandrica, and Madhaviya.

Copy of the Memorandum referred to in the above Extract; ante, p. 175.

After carefully considering Mr. Ellis's observations, I do not find reason to change my opinion, that the adoption of a son by purchase is prohibited by books, received as authority in the South of India. The silence of the Mitacshara and Madhaviya, will not avail against the explicit language of so many others, particularly the Smriti Chandrica, and numerous treatises on adoption. For the silence of the Madhaviya, it is the less to be relied upon in argument, since it appears from a remark of Mr. Ellis, that the author of that work does quote, in his treatise on adoption, the very prohibition in question,

restricted, however, as Mr. Ellis understands the quotation, to the *Devijati;* and I find him cited in a commentary on the Mitacshara for that quotation, *unrestricted.*

The commentators of the Mitacshara do not understand the silence of this work as an indication of dissent; but merely as an omission, which they supply in these words: "All this relates to other ages. But, in "the Cali, the true legitimate son, and the son given, "as well as appointed daughter (since she is equal to "the legitimate son), are alone admissible; for a text "of law prohibits in the Cali age, the filiation of any but "the legitimate issue, and son given; and the practice "of the virtuous, in the present age, is observed to be "conformable to that prohibition."

The passage cited from the *Lohita Smriti* by Mr. Ellis, does not convey to my comprehension the meaning which his Pundits deduce from it; but, on the contrary, disapprobation of any adoption. The author distinctly specifies, among the twelve descriptions of sons which he disallows, "the *Vicrita*," "one sold by "his parents, or by those who represent them;" and finally admits none but two sons: viz. "a man's own "issue, and his daughter's."

Perhaps Mr. Ellis's Pundits argue, that the *Datta*, though placed in the middle of the last, is not meant to be condemned, and that a son "given by interested "parents" is, in other words, one sold. But that is inconsistent with the separate mention of the son sold, and incompatible with the enumeration of twelve modes

of filiation disallowed in the Cali age; which, in the text of the Lohita Smriti, are, 1st. the *Cshetraja*, son of an appointed wife; 2d. *Gudhaja*, of concealed birth; 3d. *Canina*, unmarried woman's issue; 4th. *Paunerbhava*, offspring of a twice married woman; 5th. *Datta*, given; [all five comprehending two sorts respectively;] 6th. *Vicrita*, sold; 7th. *Swayancrita*, self-sold; 8th. *Critrima*, made; 9th. *Swayandatta*, self-given; 10th. *Sahodhaja*, issue of a pregnant bride; 11th. Son of an appointed wife by a childless man; (or *Dwyamushyayana;*) 12th. *Apaviddha*, deserted.(1)

Possibly, the Pundits may contend, that the author, by allotting shares to both descriptions of *Datta*, (given by interested, or by disinterested parents,) recognises the legality of this mode of adoption. But they must in that case equally admit the legality of the 11th in the list, pronounced by *Lohita*, heir of two fathers. And, if both or either be admitted, the number of twelve disallowed modes of filiation will be incomplete.

The only use, I think, which could be made of the text, in support of Mr. Ellis's argument, would be in favour of the position, that, if actually made, the adoption is not null, though it violate a prohibition. I apprehend, however, that such a position is not to be admitted, on the strength either of this, or of the passage which Mr. Ellis quotes in support of it. The meaning of that passage is, that a lawful adoption actually made, is not to be set aside for some informality which may have attended it; not that an unlaw-

(1) Vide post, p. 197. 206.

ful adoption shall be maintained. Some of the prohibitory texts do indeed merely state the various obsolete modes of adoption, as "matters to be shunned;" but other passages are more explicit, and declare those modes of filiation to be "parts of the ancient law, which "were abrogated by authority at the commencement "of the present age;" and "acts which men of this age "cannot do, as not possessing the powers of those of "earlier periods."

The only modes of adoption, besides the daughter's son, which the law, as now in force, permits, are the *Datta*, excepted from the sweeping prohibition in almost every text on the subject; and the *Critrima*, specially excepted by Parasara. It has been proposed, by some modern writers, as Mr. Ellis does, to construe *Datta* in a large sense, to comprehend analogous modes of adoption, such as purchase, self-gift, &c. But other writers of eminence have formally confuted that interpretation; and they even construe Parasara's text, so as to exclude the *Critrima*, and permit no adoption but that of *Datta*, or son given.

Mr. Ellis, however, thinks, that the prohibition, if at all in force, is restricted to the twice-born, or Brahmin; or at most the Brahmin and Rajput. I have before stated my reasons for considering the restriction in question, to be unconnected with the subject of adoption, and confined to the contiguous words, concerning the use of intoxicating liquors. I adhere to those reasons, supported as they are by the commentator of Parasara, whom I cited, and, considering them to retain

their strength, whether the line containing the restriction, (which is wanting in *Saunaca's* text, and, in compilations, stands remote from that concerning adoption,) have been approximated by some other writer, or by an interpolating copyist. I will add, as a further argument, that if the extended application of the restrictive words be admitted, instead of confining them to the immediate topic of intoxicating liquors, it will follow, that other prohibited acts are only forbidden to the twice-born, and that the inferior tribe is still authorized to perform human sacrifices, and practise other abominations noticed in the text.

But, granting that the whole string of prohibitions, contained in those lines, are restricted to the *Dwijati*, or twice-born, I cannot agree that the term can be here restrained in its signification to the Brahmin, or Brahmin and Cshatriya; exclusive of the Vanie, or Banian. The author of the passage assuredly used the term in its common acceptation, which includes the three superior tribes; and a compiler, in the South of India, does not, by citing the passage in a book there compiled, vary the sense of the word, or change the meaning of the author who used it. And the prohibition, as delivered in the particular passage which is cited, cannot be confined to the superior tribes; some other passages, to which reference has been made, declare the prohibition general, and the abrogation of the ancient law, relating to those matters, universal, as already observed.

The rest of the arguments in Mr. Ellis's observations,

relate chiefly to the force of usage, as opposed to law, and to the justifiableness of the particular custom of adoption by purchase, alleged to prevail in the South of India. I have from the first said, that the custom, if it do prevail through the provinces, may hold, notwithstanding the prohibition found in the law, and acknowledged and observed in other provinces of India. But it does not appear to be established that such a custom does exist. It is not pretended to be a general one, received by all the tribes; and no proof of particular usage seems to have been brought at the trial. To acquire the force of law, usage must be, not the erroneous or dubious practice of individuals, but an established practice, recognized and acknowledged by the entire people in the whole tribe.

Extract of a Letter from Sir Thomas Strange to Lieutenant-Colonel Blackburne, Resident at the Court of the Rajah of Tanjore, dated May 9, 1812.

(Ante, vol. i. p. 102.)

We have had lately two questions before us, upon which, remaining as they do under consideration, I am desirous, before we come to a decision upon them, of obtaining the sentiments of the living, in addition to what is to be collected on the subject from books. There must be at the Court of the Rajah many learned in Hindu law, whom I should be greatly obliged to you to consult for me on the occasion, procuring and transmitting me, as soon as you conveniently can, their written opinions. You may remember having formerly laid me under a similar obligation.

The first respects a claim of adoption by purchase; a mode of acquiring a son, permitted by the ancient law, as appears by Menu; but, together with a number of other exceptionable practices, said to have been abrogated about the commencement of the present (the *Cali)* age. You will see this noticed in a "general note" of Sir William Jones, at the end of his translation. In the Digest of Jagannatha Turkapunchanana, translated by Mr. Colebrooke, there are texts and passages to the same effect, prohibitory of this mode of filiation. (Vol. iii. sect. viii. "On the Son given," p. 272; and sect. xv. "On the Adoption of Sons," p. 289, 8vo. ed.) It is said that these authorities apply only to the Bengal provinces,

where it is admitted that the practice in question has become obsolete. It has been alleged, that the practice continues to the southward, in a degree amounting to usage, that would have a claim to be protected by law; though this has not yet appeared in evidence. When the case was before us last term, our attention was primarily drawn to the circumstances, as they appeared in evidence, upon which we were of opinion that no adoption had ever taken place, whatever might have been in the contemplation of the parties. In this view of the matter, we stopped short of the strictly legal question, as to the competency in this age, and in this part of India, of the sort of adoption contended for. The case is to be reconsidered next term, when, if we have reason to think that we have been wrong in our conclusion upon the fact of adoption, we must come to the law; and it is that we may be the better prepared upon both points, that you are now troubled. The point whether, under the circumstances, it is to be taken that there ever was an adoption, is indeed a mixed question of law and fact, the other a pure question of law. Enclosure No. 1, details the case, (1) as it appeared to us upon the trial; the questions that arise upon it are subjoined. Before the trial, I laid my account with the dry point of law being the only question that would be before us, not doubting that a clear case of adoption by purchase would be established. Upon the validity of such an adoption, the authorities to which I have referred, are clear, that it ceased at the beginning

(1) Vid. ante, from p. 140 to 147.

of the present age; but their application to this part of India being disputed, it becomes necessary to consider the matter a little further, and to refer to Southern Pundits. In consulting them, it follows that it will be of importance to let them understand the ground upon which the discussion rests; and it may be convenient if their attention be drawn to the distinctions and observations that have occurred, as I am about to point them out.

The highest authority upon the subject of adoption, the *Datta Mimansa*,(1) asserts the prohibition; but, if I am rightly informed, confines it to the twice-born (*Durjati*). The passage to which I allude is as follows: "The taking of any of the twelve descriptions of sons, "except the adopted son, and the son of the body;— "human and equine sacrifices; and intoxicating liquors, "are to be avoided by *(Durjati)* twice-born men, in "*Caliyuga*." It may be asked, Who are comprehended under the description of *Durjati?* I am given to understand that, in former ages, it included Brahmins, Chatryas, and Vaisyas; but that, in the present, it is confined to Brahmins, these only performing the *Oopanayamum*, or ceremony of tying the sacrificial cord, whence the second birth, with the texts of the Veda. The inference, according to this authority and construction, would be, that the practice in the *Caliyuga* is forbidden only to Brahmins.

The Smriti Chandrica is among the authorities that

(1) Or Narada Purana. It is to this that Mr Colebrooke always refers. There are many other Mimansas. Mr [illegible] quotes from that of Vaiyanama Swami. Vol. [illegible], p. 136.

prevail in this part of India; and he is express, without limitation or distinction of class, that, failing male issue, a man may receive a son that is given to him, but not take one of any other description. The extract furnished me is to this effect: "The taking of any of the eleven "descriptions of sons, following the son of the body, "was admitted in the former ages, but, in the *Caliyuga*, "the adopted son only." As in the text beginning, "*The* "*taking of any, except the adopted son, and the son of the* "*body, &c.*, which prohibits the taking of any of the rest "in the *Caliyuga*. The substituting a daughter for a "son is also prohibited, being included among those "rejected in the *Caliyuga*. Thus it is to be observed, that "in the event of the failure of either the son of the body, "or a grandson, a man may adopt a son, but not take one "of any other description."—This seems to include all the classes. It is the opinion of some, however, that, as this *Smriti* professes to proceed upon the *Datta Mimansa*, a limitation is implied; and that the passage, though generally worded, must be construed with reference to the twice-born only, such being the doctrine of the treatise to which he refers.

The authority that prevails, I think, more than any other, with us to the southward, is Vijnyaneswara. This work is a commentary upon Yajnyawalcya, one of the eighteen *Smritis*. In the part that relates to inheritance, there is a chapter upon "Sons bought," in which one would expect to find the prohibition noticed, supposing the practice in question to have been abrogated in the part of India for which he wrote, as well as in the higher

provinces. It is remarkable, however, that he is silent as to the disallowance of this mode of acquiring a son in the present age. He is so at least in the chapter to which I have referred. See the Mitacshara, lately translated by Mr. Colebrooke, p. 312.—How is this to be accounted for? Can it be explained? It is possible that, in some other part of his work, he may have noticed it.

The *Madhaviya* is another commentator, admitted to be of great authority on the coast. The book is rare at Madras. There will be copies of it, I dare say, at Tanjore, which having been examined for the purpose, I should be glad to be favoured with the result.

Extract of a Letter from Lieutenant-Colonel Blackburne, Resident at Tanjore, dated June 2, 1812.

(Ante, vol. i. p. 102.)

I HAVE the honour to transmit herewith an original letter from His Highness the Rajah of Tanjore, and the answer of the Pundits to the questions contained in your letter of the 9th of May.(1) I am uncertain whether the answers are in the form which you desire; I will not, however, detain them on that account, but shall receive with the greatest possible pleasure any further commands on the subject, which you may do me the favour to send to me. His Highness has taken it up *con amore*, and will, at all times, be highly gratified by your calling for the opinions of his Pundits.

(1) Ante, p. 182.

Opinion of the Pundits of the Court of the Rajah of Tanjore.

(Ante, vol. i. p. 102.).

Accompanying His Highness's Letter to the Resident, of May 29, 1812.

Having examined *Menu Smriti*, and *Smriti Chandrica*, with many other authorities, and having considered the questions referred, the Pundits of the Court of His Highness the Rajah of Tanjore are agreed in the following answer, which they hope may be satisfactory.

The case in substance is, that one *Davidutta*, a Sudra, having no male issue, purchased *Yegnedutta*, a lad of his own caste, whom he brought up, and treated like a son. *Davidutta* being dead, *Yegnedutta*, so bought, cannot be considered as such, although the *purchased son* be one of the eleven anciently recognised by the law as capable of inheriting, distinct from the son of the body;—but, among a variety of prohibitions established for the *Caliyuga*, the competency of any son, other than that of the body, and one given in adoption, (the *Aurasa*, and the *Datta*,) is repealed. It is impossible to sustain the suggestion that is to be found in a certain *Datta Mimansa*, limiting the prohibition to *Devijahs*, or the twice-

born only, since, in various other books,(1) of acknowledged anthority in Southern India, in the chapter containing the prohibitions of the *Caliyuga*, the passage in the *Auditya Pooranum*, establishing the restriction in question, is constantly repeated, without any limitation as to caste. Opposed to such a mass of authority, the assumption of a single *Datta Mimansa* to the contrary can carry with it but little weight. Moreover in other works,(2) there are chapters on the prohibitions, declaring that, in the *Krita*, *Traita*, and *Devapara yugas*, men were devout and pious, while, of the *Calyuga*, weakness is the characteristic; whence sons, who were recognised in former times, are no longer admissible. In the declarations of Vrihaspati, the terms "men" and "moderns," denoting mankind in general, and the characteristic impiousness of the *Calyuga*, upon which the restriction is founded, being common to all, it follows that it is applicable to all; otherwise, should the terms used be construed to refer to Brahmins only, the inference would be, that they alone are weak and irreligious, the Sudra, on the contrary, distinguished for correctness of conduct and devotion; which, whether it be so, experience tells, and may be left to every man's judgment. It is further observable, that, in other instances, the limitation to Brahmins is express; as in the *Brama Pooranum*, where the

(1) *Smriti Chandrica, Madhaveyah, Varadarajah, Vydenauda-Dutchitya, Nurnaya Sindoo, Mayooka-Smriti, Smriti Sindoo, Smrita Suara, Smriti Yarthasungraha, Serenskarakounstoobha, Kaulnirnayadeepica, Chatoor-Vimsitimatasoonskara-kaunda, Haimaudree*; and numerous tracts of *Datta-Mimamsa, Veevaudasangamuru*, and *Datta Munjunse*.

(2) Such as *Veevauda Bhungarnava, Smriti Sindoo*, &c.

marrying of girls from the inferior tribes, the sacrificing of men and horses, and the use of spirituous liquors, is prohibited to *Durjatee*, in terms, in the *Calyuga;* thus virtually negativing the idea, where the restriction, both in terms, and in its nature, is applicable to all. Were the limitation contended for to be admitted, the Sudra would be left at liberty to indulge in practices at which the mind revolts;—such as *(Cshetraya)* the begetting of sons on women, by others than their lawful husbands. The prohibition in question may be considered as implicitly approved also by Vijnyaneswara, according to the maxim, that whatever is not specified in one book, if there be nothing in it contradictory, or inconsistent, may be deduced to it from others. And even, where, in some books, a particular prohibition, which is general in others, is applied to a certain class, it does not follow that the application is exclusive; the construction only being that in the class named the breach will be more criminal. For instance, it being laid down in all the books, that a Brahmin is not to be put to death, you are told in one that, upon no account is the life of the *Autraya* Brahmin to be touched. Now, if a general rule is to be superseded by a particular one, the *Autraya* alone is protected: but the effect only is, that the blame, in the specified case, is aggravated. To legalize the adoption of one already purchased, would be incongruous, as well as a contravention of the general law; since what is already become a man's own, whether by purchase, or otherwise, cannot by any means be more so. Therefore, upon the whole, adoption, after purchase, being like the flower in the

sky, it is plain to us that sale and purchase can be no foundation for the boy bought being considered as heir to the purchaser.

(Signed) NAURAYANA, *Sastry*,
RAUGAVA, *Chary*,
SOOBRAMONEYA, *Sastry*,
SUAMY, *Sastry*,
SAKHARAH, *Sastry*,
KOOPAH, *Sastry*,
ANUNTAKISTNA, *Sastry*,
CHUCKVAVURTY, *Auchery*,
RATNAGAVELSVARA, *Sastry*,
BAUVOO, *Sastry*,
MAHADAVA, *Sastry*
VENEATA, *Chary*,
TREEPATY, *Sastry*.

Extract of Letter from Mr. Ellis, returning Mr. Colebrooke's reply.

(Ante, vol. i. p. 108.)

I OUGHT to have returned you the enclosed paper[1] before. I have no further remark to make on the subject to which it relates, except that Mr. Colebrooke and myself, differing but little with respect to the main question, view it in directly contrary lights. Mr. Colebrooke maintains the law as illustrated by the principal commentators in those countries where, at one period, it was in absolute operation. I have been considering it with the Jurists of this part of India, as a standard to be referred to, rather than a rule to be invariably followed. Hence it is, that the weight of authority is referred to, in support of the former argument;—particular texts, and general reasoning in that of the latter. My paper, however, is by no means intended, as is stated in the last paragraph of the one returned, to oppose the force of usage to law; but to reconcile usage and law together, or rather, to shew that they do not disagree.

(1) Ante, p. 151.

Extract of a Letter from Sir Thomas Strange to Henry Colebrooke, Esq., dated Madras, 12th Oct. 1812.

(Ante, vol. i. p. 102.)

I WAS favoured a day or two ago with your letter of 12th September, in reply to mine of the 11th and 20th of August, accompanied by a memorandum, in answer to Mr. Ellis's observations on the question, with which you have been for some time troubled, respecting the legality in the present age of adoption by purchase. If you have not put it at rest, you have at least furnished materials for the purpose. This, I hope, will be admitted even by Mr. Ellis, who is not apt to concede. With respect to the suit, in which the question arose, I have reason to think it has been accommodated between the parties, without waiting a decision on the point. As the lad had been bred up in the family, more like a child of it, than any thing else, it seemed harsh that he should, after all, without any apparent fault of his, be cast upon the world, at the age of fifteen, pennyless. The Court accordingly encouraged a disposition to a compromise, which I believe has taken place, though I am not assured of the fact.

SUBSIDIARY SONS UNDER THE ANCIENT LAW.

(Ante, vol. i. p. 76. 103.)

ADOPTION is a familiar idea; but the extent to which it was carried, and the rules to which it was reduced among the Hindoos, was peculiar to their law. With them, professing, as it did, to be founded on a religious solicitude for representation by means of a son, their anxiety was for a legally begotten one, if possible; but, this being considered by them as depending on destiny,(1) their law admitted the substitution of a variety of subsidiary ones, to the number, according to Menu, and most other authorities, of eleven;(2) for the more effectually securing the due performance of the last obsequies, in a manner the most efficacious for the *manes* of the deceased. The co-existence of any considerable number was probably rare; but, the law provided for the occurrence, by settling the order of succession among them, as may be seen upon reference to the several arrangements by Menu,(3) Yajnyawalcya,(4) Vishnu, and others.(5) These various subsidiaries differing, as it will appear they did, in the mode of their filiation, were estimated differently;—all being postponed in their claims, as

(1) Sri Bhágavata, 3. Dig. 222.
(2) 3 Dig 145, et seq. and ante, vol. i. p. 62.
(3) Menu, ch. IX. 159, 160.
(4) Mit. on Inh. I. XI. 1.
(5) 3 Dig. 150, et seq. 155. 286.—and Datt. Chandr. sect. v.

comparatively deficient in spiritual efficacy, to the son legally begotten; and, as among one another, possessing relative degrees of respectability; but all capable, in their turn and order, of inheriting, as connected with their eventual destination, to administer, by their pious offices, toward the final beatitude of their adoptive parent. This distinction in particular prevailed among them; that, while some, like the son begotten, were heirs general, inheriting universally, others succeeded on his death, in default of male issue, to the estate of their adoptive father, but not to that of collateral relations; and, as incident to it, their shares differed, in the event of a son begotten, surviving, and inheriting.(1) But, though this would appear to be the general result of what is stated on the subject, opinions were not wanting, that, where several of such sons co-existed, either the rule of succession was to be drawn from the different degrees of virtue attributable to each, without attending to the particular species of adoption; or that all, so far as rank could be assimilated, should take and divide the heritage alike.(2) Into these details (of which the books in treating on this part of the law are full,) it were loss of time to enter; so extravagant, and, in some instances,

(1) Menu, ch. IX. 161.
Yama, 3 Dig. 155.
Calica Purana, Id.
Datt. Mim. I. 33, 34.
Datt. Chandr. v. 26, et seq.

(2) Menu, ch. IX. 184.
3 Dig. 286, 287.
Note to Mit. on Inh. ch. I. xi. 34.

so exceptionable a method of building up a family, and continuing a name, having long since subsided pretty much into the mode of substitution already discussed, namely, the *Dattaca*, or adoption by means of a son *given*.(1) But, as a matter of curiosity, intimately appertaining to the subject, the following list of the whole is added, according to the arrangement of Menu; with his descriptions, a little amplified. And, that this should be done, is the more expedient, as analogies are still founded on this variety, and illustrations often drawn from the law respecting it, however obsolete; which could not otherwise be so well understood. Upon which it may be premised in general, that the instances enumerated have been distinguished into, 1st. Issue begotten by a man himself; 2dly. Issue pro-created for him by another; 3dly. Sons received for adoption; 4thly. Sons voluntarily given;—and that

On the birth subsequent, of a son legitimately begotten, a subsidiary one, previously constituted by whatever means, has no right of primogeniture; also that such, among the subsidiary ones, as were of equal class with the father, during the prevalence of the system, were entitled to a third of the inheritance, as their allotment; while those, by mothers of a lower tribe, lived dependant on the family for food and raiment.

(1) Jim Vah. ch. X. 7, note.

List.

Of the *Dattaca*, (No. 3.) the appointment, condition, and rights, have already been considered, in the chapter on adoption.(1) And, respecting the *Crita*, (No. 9.) an ample discussion occupies many of the preceding pages of this Appendix.(2) It remains to subjoin here a short explanation of the rest, adding a few general remarks on the whole, particularly as regarding the right of inheritance. T. A. S.

I.

AURASA, from Uras, the breast; the legitimate son, begotten by the husband in lawful wedlock, called, the

(1) Vol. i. ch. III. p. 61.
(2) Ante, from p. 132 to p. 192.

son of the body. (1) It is to be noticed, that lawful wedlock, for a man of a regenerated tribe, had formerly a considerable latitude, A regenerate man is one belonging to any of the three superior classes, the Brahmana, Cshatriya, or Vaisya; for whom a lawful wife was a woman of a regenerate tribe, not necessarily, as now, one of the same class. A woman of the same class was always preferable, but not indispensable; and, in default of a preferable one, even a Sudra might have been the wife of a regenerate husband; and their issue would have been legitimate. These marriages of a Brahmin with a woman of any of the four classes, of a Cshatriya, with a Vaisya, or of a Vaisya with a Sudra, (i. e. always in the *direct* order of the classes,) were productive of a variety of mixed ones, distinguished by appropriate names; carrying legitimacy in ancient times to a great extent; it being in the *inverse* order only that marriage was forbidden; the prohibition rendering illegitimate sons by women of a tribe superior to their husband. (2) But the *Aurasa*, the legitimate son, is restricted *now* to the issue of a marriage between parties of the *same* class. On viewing his countenance, the debt of salvation, due by the father to his own progenitors, is said to be transferred to such a son; whose birth removes an obstacle that existed to the future happiness of the father himself, exempting him, after death, from eventual transmigration. It is even said, that heaven is not for one, not having a son; nor can a heavier curse be pronounced upon a

(1) Menu, ch. IX. 158. 166.

(2) Notes to Mit. on Inh. chap. I. s. 2. and to Id. § 30. Datt. Mim. and note on II. 55.

Hindoo, than that he may be childless.(1) It is added that heaven is already attained in his lifetime, by one who has sons, not having neglected the Vedas, and sacrifices. By a son, according to this creed, the father conquers, i. e. attains the world of *Indra*, and others; by a grandson, his enjoyment of them is continued; and by a great-grandson, (to use the exalted language of their chief legislator,) he reaches the Solar abode.(2)

The next in the enumeration of Menu, is the *Cshetraja*, who will be presently noticed; but it may be convenient to interpose here an account of the *Putrica-putra*, or son of an appointed daughter; who, in some lists, (as in those of Vajnyawalcya and Devala,)(3) stands second; in others, lower down; having no separate place in Menu's, for this reason; that, according to him, and the authorities following him, he was identified with the *Aurasa*, or legitimate son: there being, between such a son, and a man's own, "no difference in law;" so that both co-existing, the division of the heritage was to be equal.(4) He (the *Putrica-putra*) was of two kinds, the appointed daughter's son, and, by a laxity in language,(5) the daughter herself appointed to be as a son; in which latter case, she performed the obsequies of her father; the difference consisting in the forms of appointment, according to which the appointed daughter, or her son, became

(1) Vasishta, 3 Dig. 296.
(2) Menu, ch. IX. 137.
3 Dig. 295.
(3) Mit. on Inh. ch. I. xi. 1.—3 Dig. 153.
(4) Menu, ch. IX. 131 to 134.
(5) 3 Dig. 168.

substituted as an adopted.(1) According to some, he was of four descriptions; viz. the two that have been mentioned, and the third and fourth varying, according to the form of the stipulation, with which the daughter was given in marriage.(2) And, upon general principles, if the father, and maternal grandfather of such a child, happened to be each otherwise destitute of male issue, he was competent to perform the obsequies of both;—or it might have been so settled. To such a daughter, rank was assigned as the possible mother of a son, adopted by her father.(3) According to Vasishta,(4) the father, addressing himself to the bridegroom, (his future son-in-law,) the common form of appointment was as follows:—"This damsel, who has no brother, I give unto thee, "decked with ornaments: the son who may be born of her "shall be my son."—Or, there might be a similar appropriation subsequent; whence, in the choice of a wife, a prejudice existed against a young woman who had no brother, her first son being thus liable to be pre-engaged.(5) In this manner, as stands recorded, did Dacsha himself, destitute of male issue, in very early times, appoint all his fifty daughters to raise up sons to him for the multiplying of his race; giving ten to Dherma, thirteen to Casyapa, and twenty-seven to Soma, king of Brahmins, with

(1) 3 Dig. 193.
(2) Mit. on Inh. note to ch. I. xi. 3.
3 Dig. 193.
(3) 3 Dig. 168.
(4) Mit. on Inh. ch. I. xi. 3.
3 Dig. 171.
(5) Sancha and Lichita, 3 Dig. 168. 192.

suitable presents.(1) It remains to add, as resting upon the authority of the most respectable opinions, that, not regarding the *Putrica-putra* as a subsidiary son, his affiliation (it would not be unreasonable to infer) would be valid in the present age.(2) To return then, to the enumeration and order, as exhibited by Menu; with whom the second is,

II.

The CSHETRAJA, or son begotten on a wife, or widow, whether by a near kinsman of the husband, or by a man of a superior class; in either case with his assent, he being, from whatever cause, destitute of male issue. (3) As in adoption, so here, the husband's brother, where there was one, was the proper person to be so employed. The want of the husband's authority might be supplied after his death by that of the wife's spiritual parents. (4) Wholly unauthorized, or not begotten according to the law, the issue could not succeed.(5) The practice, not peculiar to Hindoos, (6) is compared to the seed of one sown in the soil of another, and so belonging to the owner of the soil; (7) and certain directions were to

(1) Menu, ch. IX. 128, 129.
3 Dig. 184.

(2) Vid. note to Mr. Sutherland's Synopsis, p. 221.

(3) Menu, ch. IX. 167. 146. 190.
3 Dig. 198.
Mit. on Inh. ch. I. xi. 5.

(4) 3. Dig. 197, 198. 200.
Mit. on Inh. ch. I. x. 2, and note.

(5) Menu, ch. IX. 143, 144.—3 Dig. 201.

(6) Deut. XXXV. 4.
Gen. XXXVIII. 3.

(7) Menu, ch. IX. 33, et seq.
3 Dig. 212. 215.

be observed, in order to render the act an act of duty in contradistinction to, if not exclusive of, desire; (1) as well as to limit its repetition to the accomplishment of the object, namely, the production, under the particular circumstances of a son capable of the filial duties; till when the act might be repeated. (2) The non-existence of male issue by the husband at the time, seems to have been essential to the claim of the son so begotten; and, if a son begotten by the husband was born afterwards, and survived, the several sons succeeded to their respective fathers. (3) Where the husband was dead at the time, the issue became *Dwyamushyayana*, or son to both, (4) as he did also, where either his natural father had no other male issue, or, in the event of its having been so agreed, *when the commission was given*. (5) So, if the issue proved to be a female instead of a male, she was the property of either, according as might have been settled. (6) A son is recorded in the *Mahabarata* to have been thus prevented "by the holy *Vasishta*, for *Saudasa*, a king of the solar

(1) Menu, ch. IX. 58. 60. 63. 147.
3 Dig. 195, et seq. 199, 200. 289.
Menu, ch. III. 173.
2 Dig. 474.

(2) Menu, ch. IX. 60, 61, 62. 70.
3 Dig. 196.
2 Id. 470. 485.
Gautama, id. 232.

(3) Menu, ch. IX. 162. 191.
3 Dig. 209. 331.

(4) Harita, 3 Dig. 204.

(5) Menu, ch. IX. 53.
3 Dig. 208.
Mit. on Inh. ch. I. sect. x. 2, et seq.

(6) 3 Dig. 209.

"race;" (1) an illustrious instance, of course. Nevertheless, the practice, originating with "the wicked *Vena*," and reprobated as vicious, is said to have ceased with his reign, being regarded as a violation of the primeval law, restricting the sex to one man;(2) and, according to Menu, it would seem to have been permitted, from the beginning, only to the *servile* class. (3) It continues to prevail in Orissa:(4)

III.

Dattaca, or the son *given*. (5) In an extended sense, the term comprehended sons any how adopted, more especially the following:(6) viz.

IV.

Critrima, the son *made*;(7) being an orphan, of the same class, or one who, having been abandoned by his parents, is induced to become the son of the adopter; his consent to the adoption being the only indispensable

(1) 3 Dig. 209.

(2) Menu, ch. IX. 64—68.
Mit. on Inh. I. x. 8.
2 Dig. 474.
Datt. Mim. i. 64, et seq.

(3) Menu, ch. IX. 59. 64.
3 Dig. 196.

(4) Note to 3 Dig. 276. Id. 289.
Beng. Rep. in 1816. p. 511. "Remark."

(5) Menu, ch. IX. 159. 168.
See vol. i. ch. III. p. 63.

(6) Sutherland's Synops. p. 212, and note xix. p. 227.

(7) Datt. Mim. i. 65.

requisite to its efficiency.(1) In point of ceremonial, it is the same with that of the *Dattaca*, omitting the sacrifice, or burnt-offering, which is not performed at it.(2) Succeeding partially to the adoptive right, his connexion with his natural family, by which he has never in fact been more than tacitly relinquished, remains to the *son made* in full force; and this, among other things, distinguishes him from the son *given*.(3) Initiation into the family of the adopter is not practised, where alone this mode of adoption is at this day, generally speaking, in use, namely, in the *Mait'hila* country,(4) whatever might be its effect, if performed, in assimilating it more to that of the son given, especially in the event of its not having previously taken place, in the natural family of the adopted.(5) In *Mait'hila*, also, the widow is, as of right, at liberty to adopt, without special authority for the purpose; the adopted, in this case, succeeding to her exclusive property only, not to that of her deceased husband, to whom he is not considered as in any way related.(6) Whether, *out* of *Mait'hila*, or wherever else this mode of adoption customarily prevails, it would be

(1) Menu, ch. IX. [illegible] 169. 3 Dig. [illegible].
Mit. on Inh. I. xi. 17, note.
Sutherland's Synopsis, note viii. p. [illegible].
3 Dig. [illegible].

(2) Mit. on Inh. I. xi. [illegible], and note.

(3) Note to 3 Dig. [illegible]—Id. [illegible].
Notes xviii. and xix. to Mr. Sutherland's Synopsis, p.

(4) Note to 3 Dig. [illegible].
Note xv. to Mr. Sutherland's Synopsis, p. [illegible].

(5) Notes xviii. and xix. to Mr. Sutherland's Synopsis, p. [illegible].

(6) Note x. to Mr. Sutherland's Synopsis, p. [illegible].

sustained as legally valid, must be left for future inquiry. An opinion, to which great weight is due, is in its favour; founded upon authorities, identifying the *Dattaca* and the *Critrima*, and even using the former denomination as denoting both.(1) In the only reported cases on the subject,(2) the adoption was from the district of *Tirhoot*, in *Mait'hila*, which of course leaves the question open.

V.

GUDHOTPANNA, or Gud'haja;(3) a son of concealed birth, secretly begotten on a married woman, by a man of the same class with her husband, *but without his privity;* which distinguishes him from the *Cshetraja;* the husband being supposed by Menu to have been absent at the time.(4) Failing prior claimants, the son in question was entitled to be considered as belonging to his mother's husband; a pretension, founded on the doctrine of the right to the soil prevailing over that of the seed;(5) *partus sequens ventrem.* If the begotten was alike unknown to the wife as to the husband, as where she was "secretly violated by a stranger, in a dark "night," the importance of the offspring was proportion-

(1) Mr. Sutherland's Synops. p. 211, 212, and note x. p. 224.

(2) Kullean Sing v. Kirpa Sing, Beng. Rep. ante 1805, p. 9.
M. Sutputtee v. Indranund Jha, Beng. Rep. in 1816, p. 509.

(3) Menu, ch. IX. 159.

(4) Menu, ch. IX. 170.
3 Dig. 210.

(5) Menu, ch. IX. 32, et seq.
3 Dig. 215.

ably diminished, and it was even liable, according to some, to be abandoned.(1)

VI.

APAVIDDHA; the son rejected by his natural parents,(2) whether from inability to maintain him, or otherwise;(3) and, so picked up, as it were, by some stranger, not for the sake of supporting him, but from being in want of a son; in which case he became an adopted one, ranking and succeeding as such, in his turn.(4) As described, he does not appear to have differed materially from the *Critrima*, or son made; and it is accordingly said, that gift is the foundation of right to the son given; and neglect to the son made, or rejected,(5) thus coupling the latter together.

VII.

CANINA, or CANYASUTA; the son of a young unmarried woman,(6) or one whom a man's daughter privately brought forth in the house of her father.(7) He became son to his maternal grandfather, or to whoever subsequently married his mother; or to both, as the

(1) Mit. on Inh. I. xi. 6, and note.
(2) Menu, ch. IX. 159. 171.
3 Dig. 281.
(3) Mit. on Inh. I. xi. 20, and note.
(4) 3 Dig. 281.
(5) 3 Dig. 282.
(6) Menu, ch. 160. 172.
3 Dig. 225.
(7) Note to 3 Dig. 230.

one, or the other, or both, happened to be otherwise deficient in male issue.(1) The maternal grandfather's claim to him was (to recur to a familiar illustration) *in right of the field*.(2)

VIII.

SAHODHA; or the son of a pregnant bride.(3) Received together with her in marriage, he was, in law, by whomsoever begotten, the son of the bridegroom; not in right of birth, since he was not procreated by him; nor on the ground of the "receptacle belonging to him at the time of procreation," which was not the fact; but on that of *acceptance;* having been transferred to him as a part of the mother, (in common with her clothes and ornaments,) by the maternal grandfather's gift.(4) This son was distinguishable therefore from the last preceding one, (*Canina,*) by the circumstance of his having been born in wedlock, though by a form of marriage directed for women not being at the time virgins, and in use among Sudras of the lowest rank.(5) The requisites of this filiation did not include oblation to fire.(6)

(1) 3 Dig. 226. 229. 234.
(2) 3 Dig. 226.
Mit. on Inh. I. xi. 7, and note.
(3) Menu, ch. IX. 160. 173.
3 Dig. 279.
(4) 3 Dig. 280.
(5) Mit. on Inh. I. xi. 19, and note.
3 Dig. 280.
(6) 3 Dig. 280.

IX.

Crita, or the son bought; whom a man, for the sake of having a son to perform his obsequies, *purchased* from his parents, or either of them, being of the same class, and neither an only, nor an eldest one.(1)

X.

Pawner-bhava, or a son by a twice married woman.(2) 1. A woman was *not improperly* called so, where she engaged with another husband, her marriage with a former not having been consummated. This, it is to be remarked, is what no Hindu woman of caste can now regularly do.(3) 2. She was *properly* called so, if she took another, having lost her first. This also is what no widow, not even a *virgin* one, can now legally do, though the practice exists in some of the lowest castes. But, if her first husband forsook her, or if, for whatever cause, she chose to desert him, it seems to have been competent to her, in the times to which this branch of law refers, to have contracted with another, at least to the effect of producing issue inheritable to her original husband. So begotten, it differed from the *Cshetraja*, (No. II.) in that there wanted the authority of the first husband to justify the proceeding. The intervention also of marriage, dis-

(1) Menu, ch. IX. 160. 174.
3 Dig. 273.
Mit. on Inh. ch. I. xi. 16.
Vol. i. of this work, p. 90.

(2) Menu, ch. IX. 160. 175. 176.
3 Dig. 235.

(3) See chap. on Widowhood, vol. i. p. 241.

tinguished this from the case of the (*Swarini*, or) simple adulteress. 3. To a third variety, where the woman had been deflowered before marriage, the denomination seems to have been but inaccurately applied.(1) The issue in any of these cases was regarded as illegitimate, and consequently not respected; though allowed to be inheritable, on failure of legitimate, or other preferable issue. And so it may be at this day, when warranted by local usage.(2)

XI.

SWAYAN-DATTA,(3) or a son self-given; resembling in circumstances the *Critrima*, or son *made;* (No. IV.) only that, in the instance of the latter, the adoption was the act of the adopter, whereas in that of the *Swayan-datta*, the adopted gave himself. Neither the one, nor the other was, like the *Dattaca*, (No. III.) or the *Crita*, (No. IX.) given by his parents; but, on the contrary, abandonment by them characterised both the *Critrima*, and the *Swayan-datta*, between whom the only difference was, that the one was picked up, for the purpose of becoming a son; the other, tendering himself as one, was accepted. As an instance of the *Swayan-datta*, it is said to be recorded in the *Puranas*, and other works, that a king, having purchased of his father a boy named

(1) Mit. on Inh. I. xi. 8, and note.
See seven varieties compendiously stated in note to Datt. Mim. sect. iv. 58.—3 Dig. 235.

(2) Menu, ch. IX. 143.—3 Dig. 201.
Vrihaspati, 3 Dig. 241.
Mohun Sing v. Chuman Rai, Beng. Rep. ante 1805, p. 30.

(3) Menu, ch. IX. 160. 177.
3 Dig. 278.

Sunasepha, doomed him a sacrifice to the divinity; from which having been rescued by preternatural interposition, he became son of the sage *Visvamitra;* upon which it is asked, in what form did *Sunasepha* become the son of *Visvamitra*, since he had not been given to him by the boy's father? It is answered, He must be taken to have been self-given, having been abandoned by his parents.(1)

XII.

SAUDRA, or a son by a *Sudra* woman.(2) Out of ten lists, exhibited in the Digest, the authors of three only, beside Menu, include the *Saudra*, as one of the twelve legal sons. These are Vishnu, Sancha, and Lichita, with the Calica-Purana; Vishnu, and the Calica-Purana, together with Menu, omitting the *Purica-putra*, as being identified with the son born in wedlock; which Sancha and Lichita admit: the latter omitting the *Critrima*, or son *made*, as included (it may be) in the *Dattaca*, or son *given*. Vishnu,(3) as well as Menu, makes the *Saudra* the twelfth, calling him "a son any how produced irregularly:" a vague description, expounded, however, as meaning "a son of a "Sudra woman, married or unmarried," by any other than a Sudra father.(4) Such a marriage in the present day would not be competent;(5) and was blameable

(1) 3 Dig. 288.
(2) Menu, ch. IX. 160. 178, 179.—3 Dig. 144. 283.
(3) 3 Dig. 150.
(4) 3 Dig. 283.
(5) 3 Dig. 141.

always, though permitted, being an incongruous connexion, indicating weakness of intellect, and tending to degrade the race;(1) insomuch that the connexion, without marriage, was looked upon, as in fact it is with us, as the more excusable of the two; and it was accordingly to be expiated by a slight penance.(2) The son in question is, according to Menu, one begotten on a *Sudra* by a man of the *priestly* class;(3) which, in this text, is said to signify a *Brahmana*, *Cshatrya*, or *Vaisya*.(4) Nothing can be more contemptuous than Menu's description of him. Said to be begotten "through lust," all idea of marriage would seem to be excluded;(5) so that, however competent to confer *some* benefit on his putative father, he was "even regarded "as a corpse, though alive, and thence called in law a "living corpse,"(6) any benefit he could confer being inconsiderable. Upon this point, however, a difference of opinion existed between two great authorities, Jimuta Vahana, and Culluca Bhatta.(7)

(1) Menu, ch. III. 15. 19.—3 Dig. 117.
(2) 3 Dig. 119.
(3) Menu, ch. IX. 178.
(4) 3 Dig. 284.
(5) 3 Dig. 283.
(6) Menu, ch. IX. 178.
(7) 3 Dig. 144.

If the *Putrica-putra*, (1) the son of the appointed daughter, be reckoned distinct from the *Aurasa*, the legally begotten son, (as in many lists he is, though not in Menu's,) (2) and the son by a Sudra woman(3) be also admitted as one, the number of sons, (including the *Aurasa*,) as it existed under the ancient law, amounted to thirteen;—extended by some to fifteen, but this was by splitting and subdividing. Of these, the begotten son, and the son of his appointed daughter, are often included together, under the idea of *legitimate issue;* being (as already intimated) considered in point of law as one; upon which depends, whether the whole number be to be estimated at thirteen, or only at twelve.(4) Co-existing, as happened in the event of a son being born subsequent to the appointment of a daughter, they constituted one heir, their rights of inheritance being equal; in which respect, the *Putrica-putra* was distinguishable from every other; the rest being capable of *participating*, but not equally, with the son begotten; their claim to the inheritance, as contradistinguished from *allotment*, depending in general on failure of natural issue, and proceeding in a prescribed order. What this order was, it is of little practical importance at the present day to investigate, the system of subsidiary sons, with the exceptions that have appeared, no

(1) Ante, p. 199.

(2) Menu, ch. IX. 159, 160.

(3) Ante, p. 210.

(4) Menu, ch. IX. 133. 139.
Mit. on Inh. note to ch. I. xi. 34.

longer subsisting.(1) It can scarcely be taken to have been simply as they stand in the lists, which differ in this respect, more than in that of number, hardly any two being arranged alike; whence arose a difficulty, that appears to have been early resolved, by resorting to *degrees of virtue*, as affording a distinguishing and corrective principle. In this way were the "discrepan-"cies in the texts of various sages" to be reconciled.(2) How uncertain and arbitrary a criterion this must have been, is sufficiently obvious; though, in its tendency, not more injurious than the discretion with which, under the English law, every parent is invested, of determining the fortune of his children, so far as his own property is concerned, according to his sole will and caprice, excepting where they may have been provided for by settlement, or protected by entail—family arrangements, that apply comparatively to few. This reference to "degrees of virtue," without attending to the form in which a son was adopted, is said to be what was intended by Menu;(3) whose enumeration, viewed as exhibiting an order of succession, was regarded as loose;(4) an observation (it may be remarked) equally applicable to every other. With respect even to the *Dattaca*, or son given, it is remarkable, that he is not, in all the lists, among the favoured substitutes entitled to inherit generally; though the weight of authority is

(1) Mr. Sutherland's Synops. p. 211.
(2) 3 Dig. 155.—Datt. Mim. sect. v. 20, et seq.
(3) Menu, ch. IX. 184.
3 Dig. 286.
(4) Subodhini, cited in note to Mit. on Inh. I. xi. 31.

with Menu, who classes him among the six, entitled to rank, in point of inheritance, with the son legally begotten.(1) But, not to leave it to be imagined, that these enumerations were entirely at random, to be eventually varied and regulated upon the principle that has been alluded to, the order laid down in them is said to have been, "upon the supposition of proportionate good "qualities:"(2) so that, when these happened not to exist, the place and turn of any one might be changed; preferring or postponing him according to his relative merits. Subject to some reserve of this nature, the law may be taken to have been peremptory, that, "on failure "of these first mentioned, the next in order should "give the funeral cake, and claim the heritage;(3) their "comparative excellence depending, in general, upon "the character of their filiation."(4) Whatever may have been the force of the principle, of superior or inferior virtue, as among the subsidiaries, no excess (it would seem) in any of them could operate to countervail the claim of the son legally begotten; which, in this respect, appears to have been indefeasible; while, on the other hand, where the virtue among them was equal, they were to share alike.(5) These distinctions and differences (it is obvious) could only arise, where a plurality of subsidiary sons came in competition, and

(1) Menu, ch. IX. 159.

(2) 3 Dig. 286.

(3) Yajnyawalcya, 3 Dig. 153. 386, et seq.

(4) 3 Dig. 156.

(5) Menu, ch. IX. 184.—3 Dig. 286.

partition took place in the lifetime of the father; the law contemplating the possibility of their co-existence, to the extent of the whole number of twelve.(1)

Of the sons above enumerated, those referred to below(2) were particularly exceptionable; some, from the discreditable circumstances under which they were conceived; others, from the odious nature of their adoption; the son by a *Sudra* woman being, beyond every other, disesteemed; and, accordingly, though legitimate, on failure of every other claimant, allowed no more than a tenth of the paternal property, not including land.(3) With regard to the others, they succeeded, each in his turn, according to his pretensions, in default of legitimate issue. But such issue, or, (as was held by some authorities,) any one of the unexceptionable subsidiaries existing, an exceptionable one did not participate, being entitled to maintenance only; as was the lot of any one, in case of disobedience to the regular heir, or of a general deficiency in good qualities;(4) to which is to be added, that the son of the

(1) 3 Dig. 173. 287.

(2) The son of concealed birth ··· ante, p. 205.
Son of an unmarried girl ····· — p. 206.
Son of a pregnant bride ······ — p. 207.
Son bought ················ — p. 208.
Son by a twice-married woman — p. 208.
Son self-given ·············· — p. 209.
Son by a Sudra woman ···· · — p. 210.

(3) Mit. on Inh. I. xi. 41, 42.
Id. viii. 9, 10.

(4) Mit. on Inh. I. xi. 27, 28.
Datt. Chandr. sect. v. 12, 13.
Calica Purana, 2.
3 Dig. 155.

twice-married woman, the son self-given, and the son born of a female slave, (construing the latter to have meant the son by a *Sudra* woman,) were precluded from succeeding, or being appointed, to empire.(1)

What is principally material at the present day, is, to know, of these various modes of substitution for legitimate issue, which among them continues to be legal; a point not always agreed, and therefore much investigated some years back by the highest living authority, (not native,) at the instance of him, by whom these strictures have been attempted; and the result, in his opinion, was,(2) that "the only modes of adoption, *(beside* "*the daughter's son)*(3) which the law, as now in force, "permits, are the *datta*,(4) excepted from the sweeping "prohibition in almost every text on this subject, and "the *critrima*,(5) specially excepted by *Parasara;*(6) "that it had been proposed by some modern writers(7) to "construe *datta* in a large sense, to comprehend analo-"gous modes of adoption, such as by purchase, self-gift, "&c.; but that other writers of eminence had formally "confuted that interpretation; and that they even con-"strued Parásara's text, so as to exclude the *critrima*, "and permit no adoption but that of *datta*, or son given."

(1) Calica Purana, 3.
3 Dig. 155.
Datt. Chandr. v. 26, 27, 28.

(2) Ante, p. 153, et seq.

(3) Ante, p. 199.

(4) Ante, p. 203.

(5) Ante, p. 203.

(6) Datt. Mim. sect. 1. 65

(7) Ante, p. 179.

In the seventh section of the Dattaca Mimansa, translated by Mr. Sutherland, instances are given of the affiliation of *daughters*, corresponding with those anciently in use in the adoption of sons; but, taken as they are, from the Puranas, they are of no authority; and the opinion of Jagannatha remains uncontradicted, that "adoptive *sons*, being noticed by the law, are "alone legal issue; and that such *daughters*, being "unnoticed in codes of law, are not so."(1)

(1) 3 Dig. 492.

RITUAL OF THE DATTA-HOMAM.

From the Datta-Mimansa of Savara Swami.
Communicated by the late Mr. Ellis.

(Ante, vol. i. p. 94.)

The giver, petitioning the king, and having declared to his brothers and relations his intention of giving his son, named Vishnu, to become the son of Govinda, afterwards, on a prosperous day, to be fixed by an intelligent astronomer, shall bathe with the child, and celebrate the rite of *Punnyaham*. On arrival of the time, attended with trumpets and others musical instruments, he shall proceed to the appointed place, purified by cow-dung, hung with colours, and decorated with flags. There, drawing in his breath, and saying to himself, "I make the gift of a son:" he is to seat the Brahmin, to whom his son is to be given, facing the north, placing himself facing the east, and present him, in token of respect, with a cow, sandal, flowers, unbruised rice, and the like; having seated his son also, properly adorned, on his thigh, and repeated from the Veda the appropriate texts, he is to add this declaration: "I "(of such a gotram and name,) desiring the semblance "of Brahma, give this son of mine to perform the duty "of a son to you, (of such gotram and name), for the "sake of the glorious and mighty Vishnu.—He is no "longer mine." Thus saying, and having previously given Turmaric water, he is to seat his son on the thigh of the adopting Brahmin, who is to accept him with

prayer and holy texts, receiving with him from the giver, a present in gold, of the weight of a *nischam*, accompanied also with prayer. The giver is afterwards to perform the remaining ceremonies, pertaining to an oblation to fire. The adopting Brahmin, then taking the child, repairs to his own house, attended with music; when, seated on the same seat with his wife and his adopted, he declares his acceptance of the child, performing, at the same time, the rite of *Datta Homam*, in confirmation of him as his son. This done, he prepares the hearth, places the fire upon it, and arranges the six vessels, namely, the ladle, the vessel for the clarified butter, and the rest. Upon which, having performed the ceremony of sprinkling, and poured the clarified butter on the fire, performing also other purifications, and taking the butter with the ladle, he repeats certain *mantrams*. After this, he pours the butter into the fire, and placing upon it the *Samit* and *Idmam*, with its string, he performs *Jayadi*. Removing then the image of Brahma, he places the child on his thigh, pronouncing other prayers, and feeding him with *panchamrutam*; (rice and milk, sweetened with honey, &c.) Finally, he gives food to a number of Brahmins, in honour of his ancestors. The above rite regards the adoption of a son from a different gotram.

Upon the above statement, it is remarked by Mr. Ellis, that the Brahmin only being mentioned, it follows that this ceremony is necessary only with respect to this caste; and that, if it be objected that the terms

include the three twice-born classes, it must be restricted at least to those tribes who now actually use the texts of the Vedam. That in Southern India, however, most, if not all the tribes, who have any pretensions to belong to the twice-born classes, Brahmins excepted, use, not the Vedam, but the *Puranic* texts only,—to whom, therefore, this ceremony is not applicable.

It is farther observed by him, that the author declares this ceremony to regard only the adoption of a son from a different gotram;—that, though not improper, it is consequently not necessary when the adopted child is taken, as in the great majority of instances it is, from the adopted father's gotram. And he concludes the result, with respect to practical use, to be, that, if the performance of the Datta Homam be established, the adoption is established; but, if otherwise, that the converse does not hold good, and that further evidence may be adduced:—adding that, in no case can the omission of the ceremony affect an adoption in other respects valid; but that, if not performed, when the adoption is from another gotram, it would seem, from analogy, that the son, so adopted, must be *Anitya-Datta*.(1)

(1) Ante, p. 121.

APPENDIX TO CHAP. V.

ON SLAVERY.

(Ante, vol, 1. p. 87—92. 108.)

REMARKS BY MR. COLEBROOKE;

Accompanying Letter from him of May 18, 1812,(1) *on reference of question upon Adoption by Purchase.*

SLAVERY is fully recognised in the Hindu law; and the various modes, by which a person becomes a slave, are enumerated in passages which will be found quoted in Jagannatha's Digest, (vol. ii. p. 224, and 228. 8vo. ed.) comprehending capture in war; voluntary submission to slavery for divers causes; involuntary, as in payment of debt, or by way of punishment; birth, or offspring of a female slave; and gift, sale, or other transfer, by a former owner.

Jagannatha proposes to include among slaves bought, received in gift, and made by stipulation, children given, sold, or made over for adoption, but not regularly or completely adopted by due performance of the prescribed religious ceremonies. If this interpretation were correct, it would be directly in point. But I find no authority for it in the earlier writers; and he himself acknowledges it to be entirely his own, expressing surprise that so apposite an interpretation should have been overlooked by preceding authors.

It is founded on a passage of the *Calica-purana,*

(1) Ante, p. 153.

the purport of which is, that children given, or otherwise made over for adoption, but whose tonsure, and the rest of the prescribed ceremonies, are not duly performed in the family name of the adopter, must be pronounced slaves. The genuineness of the text, as a passage of that *Purana*, has been questioned by some authors; and is apparently not authentic, being wanting in many copies of the *Calica*, and bearing the look of an interpolation in those which do contain it, as it does not connect well with the context. But, being quoted by most of the compilers on the subject of adoption, many of whom are writers of great authority, it must be received (whatever may be thought of its authenticity) as the expression of a doctrine that has their sanction. The author of the *Dattaca Mimansa* gives a careful exposition of the whole passage; and, coming to that part of it which conveys, that "if tonsure, and "the subsequent ceremonies be duly performed in the "family name of the adopter himself, then only do the "*Datta* and the rest become sons: otherwise they are "called slaves," observes, that "the *Critrima*, and "others, are comprehended under the term, 'the "rest;' for they become sons by those religious rites, "(*Sanscara*,) and not by mere acceptance. Otherwise, "that is, if tonsure and the rest of the ceremonies be "not performed, or if the taking be of one whose ton-"sure and other ceremonies have been already com-"pleted, a state of slavery ensues, not the relation of "son; for it is consecration that produces this filiation, "in like manner as a post is consecrated to be a sacri-

"ficial pillar." In his exposition of a subsequent part of the same passage, relating to the failure of adoption, if the child be past the limited age, the author remarks, "a state of slavery ensues, for there is not the relation "of son, and this is a third cause of a slave resulting." It appears then to be this author's opinion, that if the adoption fail, owing to the requisite ceremonies being omitted by the adopter, or being impracticable by reason of the child's age, or having been already performed, the child falls to the condition of a slave.

Were it not for this authority, I should have been disposed to consider the words of the *Calica-purana* as figurative, and intended merely to declare the adoption null, and of no effect.

A reference to that part of Jagannatha's Digest, that has been already cited, (vol. ii. p. 226, and 229. 8vo. ed.) will shew that the 2d and 3d of the Hindoo tribes are not considered to be exempt from slavery; but the Brahmin alone.

I should not apprehend, however, that any difficulty will arise on this point, as the heirs of the deceased are not likely to prefer any claim to the person and services of the youth, as a part of the inheritance, and, if they did, there would be ground enough for rejecting it. Children becoming slaves, through a failure in the requisites of adoption, must be ranked in the most favourable class, that of slaves maintained in consideration of service; who are entitled to their immediate release, on relinquishing the maintenance. Jagannatha's Digest, vol. ii. p. 247. 8vo. ed.

BOMBAY.

Court of Adawlut at Broach.

(Ante, vol. i. p. 110. 111.)

If a child be stolen and sold, and the purchaser refuse to emancipate him, he should be liberated by the magistrate. But if the master, who claims, alleges that he purchased him from his parents, and proves this to the satisfaction of the magistrate, he cannot be set at liberty against the will of his owner.

(Signed)
SHASTREE NIRBHUYARAM.

Remark.

Purchase from father or mother is a valid title. See Jagannatha, 2 Dig. 229. C.

BOMBAY.

Court of Adawlut at Broach.

(Ante, vol. i. p. 111. 117.)

One received, during a time of famine, into the house of another, and maintained, becomes thereby the slave of the person who so takes him in, not releasible by the magistrate. But, in the instance before the Court, the mistress (a dancing girl) offering to relinquish the boy in question, upon his aunt, the claimant, repaying her the expense she has incurred on his account, he may be emancipated, the magistrate being satisfied as to the relationship of the claimant.

(Signed) SHASTREE NIRBHUYARAM.
ROOP SHUNKIER.

Remark.

This is consonant to the passage of the Mitacshara, cited in Jagannatha's Digest, in commenting on a passage of Nareda, 2 Dig. vol. ii. 243. C.

BOMBAY.

Court of Adawlut at Broach.

(Ante, vol. i. p. 111. 112. 117. 118.)

One enslaved, in consideration of maintenance, on the amount disbursed for him being repaid, should be set at liberty; or, if stolen, and afterwards sold, on the price of his keep, and the purchase money repaid with interest, he should be emancipated. In the present instance, the maintenance and price of the boy in question being reimbursed, he should be restored to the claimant.

(Signed) Shastree Nirbhuyaram.
Roop Shunkier.

Remark.

According to the Mitacshara, one enslaved by force, and one sold (and also one pledged or given) by thieves, is released; so is he who saves his master's life. And certain slaves, on relinquishing maintenance, and reimbursement; *i. e.* a slave maintained in a famine, and one for maintenance, are emancipated on relinquishing maintenance, and repaying so much as has been consumed of the master's property from the commencement of their servitude. But the slave for debt, and one pledged, are emancipated by reimbursement; that is, on repayment, with interest, of the sum which the owner received when he pledged the slave, or that which the present owner

paid to the former creditor, to redeem the slave from his hands.—See Yajnyawalcya and Mitacshara, cited by Jagannatha, 2 Dig. p. 243. 246.

In this case, it does not appear under what circumstances the slavery in question arose. If by force, or sale of thieves, it is wrong to require reimbursement of maintenance. C.

BOMBAY.

Court of Adawlut at Broach.

(Ante, vol. i. p. 111. 117.)

A girl becoming a slave for subsistence is not liable to be sold by her owner to another, without her consent; and the matter coming before the magistrate, he must order her to be released. The right of sale is in parents.

(Signed) WALUBHRAM, *Sastree.*

Remark.

A slave for maintenance is emancipated on relinquishing that maintenance, and reimbursing the master his expenses. The right to reimbursement might be transferred to another master; but no other, or greater right, can be made over to him by sale, from the former owner. C.

ZILLA OF BELLARI.

Nov. 4, 1807.

Hoosany, *v.* Rundagoo.

(Ante, vol. i. p. 118.)

The Plaintiff, a dancing woman, states, that having purchased from her caste people for four pagodas, a girl called Linghee, she brought her up; and that, on her punishing her for a fault, she quitted her, and has since been harboured by the Defendant, who refuses to give her up. She accordingly sues for restitution, and for damages for her detention. The Defendant pleads, that the girl came to, and remained with him, of her own accord, and that he is ready to redeliver her to the Plaintiff, but that she refuses to return.—What is the law upon this subject?

Answer.

There is in point of law, in this respect, no distinction between the girl in question and any other property purchased by the owner, who has a right to reclaim it, if taken, or improperly withheld from her. Willingness, or a want of it in the girl to return, makes no difference as to the right of the Plaintiff to have her back.

(Signed)

Remarks.

The answer treats the question as a simple one of slavery, or of purchased property. In general, the owner of a slave shall recover his property from the person in whose hands he or she may be. But, ought courts of justice to suffer themselves to be made instruments to enforce prostitution? And should not such an abuse of an owner's power over a slave, have the effect of barring the remedy at law? C.

The woman has a right to reclaim her slave, certainly. The Sastri seems to have believed the plea of the Defendant, that the girl refused to return; otherwise he ought to have given the damages sought for the detention. E.

APPENDIX TO CHAP. VI.

ON INHERITANCE.

ZILLA OF CHINGLEPUT.

May 10, 1803.

(Ante, vol. i. p. 134.)

To Pundit Kistnamachary.

THE parties being the widows of two undivided brothers deceased, are disputing about the property of their respective husbands. On reference to the accompanying papers, you will give your opinion as to their several claims.

Answer.

Whether the estate possessed by the deceased brothers in their lifetime was inherited from their father, or acquired by themselves, while living together, they being dead, it is divisible between their respective widows in equal shares. Had it been an estate acquired separately by one of the two, it would have descended to his widow, exclusively.

(Signed) KISTNAMACHARY.

Remarks.

Presuming that the brothers died successively, this opinion is questionable. The heir to the brother who

first died was his surviving brother; who, thus becoming sole owner, would be succeeded by his widow. Mit. on Inh. ch. ii. sect. i. 39. C.

According to the Mitacshara, (ch. ii. sect. i.) the first widow would take her deceased husband's estate only in the event of its being a separated share. But here the two brothers were unseparated; and, on the decease of one, his widow was only entitled to maintenance, the brother being the heir. On his decease, the property with regard to him having become separate, by unity of possession, his widow would succeed as his heir, the other widow being still entitled, as before, to her maintenance. D.(1)

(1) William Dorin, Esq. one of the Judges of the Sudder Dewanny Adawlut, of Bengal.

ZILLA OF CUDDAPAH.

Veerakah *v.* Veneatanarnapah.

(Ante, vol. i. p. 134.)

Case.

The Plaintiff is a widow, whose husband died in the lifetime of his father, no division of property between the father and son having taken place, and the son not having acquired any in his own right. The Defendant is the father, and the Plaintiff's own family are unable to maintain her.—What are her claims?

Answer.

Had the deceased left male issue, they would have inherited to their grandfather at his death, by right of representation. But no such right vests in the widow. She is entitled, however, to look to the Defendant, the father of her deceased husband, for maintenance; and, whatever she possesses as *Stridhana*, is her own.

Remarks.

Mit. on Inh. ch. ii. sect. i. and ii. C.

The opinion of the Pandit is correct. The widow is heir to her husband only where he dies separated from his coheirs, as well as without male issue. S.

ZILLA OF CHITTORE.

Dec. 17, 1810.

(Ante, vol. i. p. 124.)

Case.

The *Calendar*(1) of a village adopted a son, who married, and died, in the lifetime of his father. The father subsequently died, having previously to his death given his *meerassee* in trust, for the support of a daughter, a sister, and the widow of his deceased son, who were all living with him at the time. And now the daughter-in-law claims it as hers. The Pundit (Ausoory Alagasingana Charloo) reported, that the disposition by the Calendar was a competent one, and the claim set up by the daughter-in-law not maintainable.

Remark.

There was nothing in the law to prevent the man disposing of his property by gift, (which this trust is) for the support of the women, in any manner he judged proper. And even, had he made no such gift, still, according to the doctrine prevalent in the school of the Mitacshara, the daughter would have inherited, in preference to the son's widow; though the author of the *Vaijayanti*, and a few other writers, hold otherwise.

C.

(1) The *Calendar*, is he to whom belongs, in villages, the function of reading and expounding the *Punch-anga*, (compounded of *puncha*, five, and *anga*, members,) signifying a book treating on astrological subjects, under five particular heads. It is the province of Brahmins. Every Hindu village has one, who receives, as his compensation, a portion of the produce which is called his *meerassee*. In some villages it is hereditary. Vid. ante, p. 120.

ZILLA OF GANJAM.

(Ante, vol. i. p. 124.)

Has a widow, whose husband died in the lifetime of his father, a right to claim a share of her father-in-law's estate? And, if not, ought not she to be maintained by her mother-in-law, the father-in-law being dead?

Answer.

It is ordained in the Saraswati Velasa, and Smriti Chandrica, in the chapter entitled Daya Bhaga, that a widow, whose husband has died, leaving his father surviving him, can have no right to claim a share of her father-in-law's estate, but only a provision for her maintenance. On the decease of the father-in-law, she must continue to be maintained by whoever succeeds to his property; and, failing other heirs, it is divisible between the mother and daughter-in-law.

Remark.

It is true that a daughter-in-law has no right to claim a share of her father-in-law's estate; nor does there exist any supposed case in which she could inherit, or participate in it. To make such relation an equal participator with a wife, is very erroneous. S.

ZILLA OF VIZAGAPATAM.

July 8, 1811.

(Ante, vol. i. p. 130.)

A widow dying, left, surviving her, a brother and a daughter, and the brother performed her funeral ceremonies.—To whom does the property belong?

Answer.

To her daughter exclusively.

(Signed)
DUSKY NARRAIN, *Sastree.*

Remark.

The brother's pretensions were grounded on passages of Hindu law, purporting that the succession to the estate, and the right of performing obsequies, go together. See "Remark" on a cause before the Sudder Dewanny Adawlut of Bengal, No. 14, of Cases before 1805. See also Mit. on Inh. ch. ii. sect. ii. 6. C.

BOMBAY.

Court of Adawlut at Broach.

May 9, 1808.

(Ante, vol. i. p. 132.)

A person having quitted home, and no intelligence of him having been received by his family, if he was from thirty to thirty-five years of age at the time of his departure, his return must be expected for twenty-one years, counting from the day he set out. If from forty to forty-five years, he must be expected for fifteen; if from sixty to sixty-five, for twelve: at the expiration of the respective periods, without any certain account of him having been received, his heir having performed three *chundrayunums*, must make an image of his missing ancestor, composed of twigs of the *Pulas* tree, or *Durba* grass, and burn it; after which, observing the ceremonies usual on death, he may take possession of his property: but, until the respective periods above stated be passed, the *missing* is the sole owner, nor can his heirs claim the inheritance.

(Signed) NIRBHUYARAM, *Sastree.*

Remark.

Játacarna, quoted in the *Nirnáyámrita*, declares, "One whose father is absent, and of whom there is "no intelligence, must, after fifteen years, make an "image of him, and perform his funeral rites in the

"prescribed form."—The *Grïkyacárícá* is cited in the *Nirnaya Sindhu* for the following text: "If he be in "the first period of life, the rites are directed after twenty "years; if he be of middle age, after fifteen; but, in "the latter period of life, after twelve. His sons having "performed three *chandrayana*(1) fasts, or thirty austere "ones, must burn an image of him made of *Cusa* grass, "and observe the mourning and other rites." C.

(1) *Chandrayana*, compounded of *chandra*, the moon, and *ayana*, motion; and means *lunar month*.

ZILLA OF GANJAM.

June 5, 1805.

(Ante, vol. i. p. 134. 139. 147)

The deceased, a Hindu woman, possessed of land, having left surviving her only two nieces, and a grandson of a third, to whom does the land descend?

Answer.

As between the grandson of the deceased niece, and the surviving sisters, the grandson succeeds. The two who survived their sister, can have no claim, having no issue. It is held in the *Smriti Sindheeva*, in the chapter of *Daya Bhaga*, treating on woman's property, that a female, having no issue, shall never succeed to land. The same is repeated in the Smriti Chandrica, Saraswati Vilasa and Verderajah.

(Signed)
C. Varadacharloo, *Pandit.*

Remark.

The opinion here delivered I regard as very inaccurate. See the erroneous doctrine, that women inherit only through having male issue, controverted in the Mitacshara on Inheritance, (chap. ii. sect. i.) Here the right of the grandson to succeed, can only be through his grandmother: therefore he can have no right to a larger share, than that to which she could have been entitled.

In fact, however, I think he has no right to any share. The doctrine of representation does not apply to the case of succession to the estate of an aunt, or great-great aunt: and the right of his grandmother had never vested. It is worthy of consideration, whether either of the three sisters could have any at all to succeed to the estate of their deceased aunt. In the series of heirs, the niece is nowhere enumerated; and my Pundit agrees with me, that the estate of the deceased would escheat rather than descend to nieces, and *a fortiori* to the grandson of a niece. S.

ZILLA OF BELLARI.

May 9, 1807.

Venkayah, Gungayah, and Chinna Venkarah.

v.

Godummah.

(Ante, vol. i. p. 130.)

The Plaintiffs are the sons of three of five brothers, who formerly divided their estate. The Defendant is the daughter of Nileapah, one of the other two, by his first wife; after the death of whom he took a second, and died, leaving no issue by the two but the Defendant, who, having married and become a widow, the second wife of Nileapah, dying, left her property to her, consisting of gold and silver ornaments. The Plaintiffs claim to be entitled to it as heirs.—Was the gift good?

Answer.

It was not;—it not being competent to the Defendant to perform the obsequies of her father's second wife; and it is a maxim of the Shaster, that the person upon whom this duty devolves, is heir. The Plaintiffs, being the late Nileapah's fraternal nephews, have on this ground a right to the property in dispute; it being moreover further declared in the Shaster, that a fraternal nephew is preferable to a widowed daughter.

The Defendant beside, not being the deceased's daughter, the property of the deceased cannot vest in her by inheritance.

Remark.

This opinion, which would be nearly correct according to the doctrine of Jimuta Vahana, does not seem to be so according to that of the Mitacshara. It is not a maxim of the law, that he who performs the obsequies is heir; but that he who succeeds to the property must perform them. (3 Dig. texts ccccl v. ccccl vii.) The Mitacshara has not hinted at any exclusion of a widowed daughter, but only gives a preference to an unmarried one; or, failing such, to one who is provided for. The Defendant is not the deceased's daughter. But neither are the Plaintiffs her nephews. Besides, the jewels seem to have been her *Stridhana*, which she had full power to bestow as she pleased. C.

MADRAS.

Sudder D. Adawlut.

(Ante, vol. i. p. 146.)

On the death of the Polygar of Ramnaad, he having been deposed in his lifetime many years before, for imputed rebellion against the Company's government, the *Rani*, his sister, through the collector of the district, claimed to succeed to any property he had left, she having, on his deposition, being placed by the government on the musnud in his stead. Her claim being referred to the Pundits of the *Sudder*, they certified that she was entitled, there not appearing to be any other claimant.

Remarks.

It does not appear to be Jagannatha's opinion, that sisters inherit in any case. Commentators on the Mitacshara allow the sister to come in, on failure of brothers. This opinion is however controverted; Mit. on Inh. ch. ii. sect. iv. § 1.[1] Perhaps this Polygar and family follow the peculiar customs of the *Nairs*, &c.; and, in that case, the sister would no doubt be the successor, in preference to any other claimant but her own son. C.

There was in this case another claimant, who, under a decree of the Court, has since succeeded, not merely to

(1) See M. Runnoo v. Jeo Rannee. Bengal Rep. ante 1805, p. 8

the personal effects of the deceased, but to the Zemindary, to the exclusion of the adopted son of the Rani. This was the daughter of the Zemindar. The application for the old *Shetupati's* effects, made through the collector, was a manœuvre of the Rani to establish her claim to the succession, and consequently to the right of adoption, by getting possession of her brother's effects, and performing his funeral ceremonies. E.

The abstract question is, whether the Hindu law acknowledges the sister as an heir: and I am inclined to believe that it does not. S.

MADRAS.

Sudder Dewanny Adawlut.

(Ante, vol. i. p. 146.)

Ramoo, serving in the Circar of Maha Tauker, had two sons; Kishn and Bramah. Kishn had a son named Lakshuman, and Bramah one named Bishn. At the death of Ramoo, in 1779, he left surviving him Kishn, Lakshuman, and Bishn, Bramah the father of Bishn having died in the lifetime of Ramoo. After Ramoo's death, Maha Tauker having settled the accounts respecting his arrears of pay, delivered a Cararnamah for the balance (Rup. 22,937½) to Lakshuman, the son of Kishn, who took upon himself to sell it, his father Kishn and his cousin living at the time. The rest of the property, left by the deceased, came into the possession of Kishn and Lakshuman. Kishn is since dead, as is also Bishn, leaving a sister. The question is, as to the sale by Lakshuman of the Cararnamah, without the consent of his father Kishn, or his cousin Bishn,—whether it was valid?

Answer.

It was not competent to Lakshuman to obtain and dispose of the Cararnamah in question, without the privity of his father and cousin, living at the time.

The sister of Bishn has no claim upon the estate of Ramoo.

(Signed) VINKATASA, *Sastree*.

Remark.

The doctrine of the Mitacshara, that an unmarried daughter shall receive from the sons out of the father's estate a fourth of what would have been her allotment had she been male, is contrary to that of other writers: but, admitting that it should regulate the present case, what would be the right of Bishn's sister? On the death of their father Bramah, out of his moiety of Ramoo's estate, the unmarried daughter would be entitled to one fourth of what her portion would be were she male; *i. e.* she would take one sixteenth of the estate mentioned. But if she be to share as a sister of Lakshuman, her allotment would be one-fourth. It would, however, be incongruous to allow this; indeed, were the principle admitted, she might possibly have to receive a smaller share than that to which she is entitled in right of her father. Thus, had Lakshuman six unmarried sisters, her portion would be only a thirty-second. On the whole, it appears to me, that a larger specific share than a sixteenth cannot be assigned to Bishn's sister, without regarding her as heir to that person; but this she certainly is not. S.

BOMBAY.

Court of Adawlut at Broach.

(Ante, vol. i. p. 140.)

The magistrate shall never take the property of a Brahmin: so says Menu. Accordingly, in the case of Lala the deceased, leaving no heirs, but property, the magistrate must cause it to be expended in performance of his funeral rites.

Remarks.

See Mitacshara, on Inheritance, ch. ii. sect. vii. 5.

C.

Right—but the Sastree might have stated what was to be done with the surplus, after performing the funeral rites. The law referred to applies to a *real Brahman*, not to one merely reputed as such. To ascertain what a real one is, see the Mitacshara; and 2 Dig. 127.(1)

E.

(1) See also p. 310, of 1st vol. of this work.

BOMBAY.

Court of Adawlut, at Broach.

(Ante, vol. i. p. 150.)

If a *Vanaprastha* (1) dies, his *Auchary*, or spiritual guide, is heir to his property. If a *Yati* (2) dies, his *Shishya* (3) succeeds. On the death of a *Brumacharee*(4) whatever he leaves is inherited by his *Dhurm Brata*, or fellow-worshippers. The report of the Pandits, proceeds to establish the right of the claimants to succeed in the case in question; from their blood-connexion with the deceased as nephews, in addition to their religious one.

(Signed) *Sastree* NIRBHUYARAM.
—— ROOP SHUNKIER.

Remarks.

See Mitacsh. on Inh. ch. ii. sect. viii. 2. 6. C.

The opinion is right; except that there was no necessity, after having shewn that D. and H. Vijaya succeeded as pupils of the *Dharma Brata* of the deceased, to substantiate their claim further, by producing them as his nephews. This circumstance could add nothing to their right; and the proof of it therefore was superfluous. E.

(1) Compounded of *vana*, a forest, and *prastha*, a rock; on which he passes his life in the practice of austerities.

(2) A Sanyasse, or mendicant.

(3) The most religious of his pupils.

(4) A professed student of theology.

This seems to agree with the passages quoted from the Mitacshara; that is to say, so far as spiritual relationship goes. It is to be hoped, that the property of persons of this description is infinitely small. D.

The heir of the *Vanaprastha*, or hermit, in the first instance, is the spiritual brother, and not preceptor. Several cases of succession, amongst Sanyasis, have been decided by the Sudder Dewanny Adawlut. See particularly Gunes Gir *v*. Amica Gir, Beng. Rep. p. 145. S.

Copy of a Paper in the hand-writing of the late Sir William Jones.

(Ante, vol. i. p. 151.)

In all classes, if a man die without male issue, the following is the canon of inheritance; and, on failure of the first named, the next in order inherits.

The wife, the daughters, the parents, the brothers, the son of a brother, the kinsmen within the seventh degree, the more distant kinsmen, the pupil, the fellow-student.

Vishnu.—The estate of a man, who leaves no male issue, goes to his wife; if he leaves no wife, it goes to his daughter; if he leaves no daughter, it goes to his grandsons, to his father, and then it goes to his mother.

2*d Yajnyau.*—Of a perpetual student in theology, of an anchorite, and of a hermit, (who are all civilly deceased,) the heirs are, in order, the virtuous pupil, and the brother in study, or he who has had the same preceptor.

On the rights of the widow.

Menu.—If the husband has been a coheir, and died before partition, his brother, and the next in order, inherit his *undivided* share; but his wife takes all his *divided* property.

Jimuta Vahana.—Whether his estate was divided or undivided, fixed or moveable, his widow inherits it. So *Raghunaudhana Sri Crishna*, and others, very properly make no distinction, where the legislators have made none.

Yajnyawalcya.—Widows are declared to have a mere usufructuary inheritance in the estate of their deceased lords, and they must by no means alien or waste it, except for the necessaries of life.

They may however give part of it to a virtuous priest, through affection for their lords, in order to perform religious rites for his soul.

Vrihaspati.—In the Veda, in the written codes of law, and by the immemorial usage of men, the wife is declared by the wise to be half of her husband's body; sharing equally with him the fruit of good or bad conduct. As long as the wife lives, half his body is alive, though the other moiety may have perished; and, while half of his body subsists, who else can inherit the wealth? Even though his kinsmen exist, his father, mother, and brother, by both parents, yet if he die without male issue, by males in the third degree, his widow shall inherit his estate.

Mr. Justice Jones, after quoting Mr. Halhed's compilation, chap. ii. sect. xii. read his own translations of the original text, from which the first words in that section of Mr. Halhed's book are taken. Sir William Jones's version of them runs thus:—"After the civil or religious "death of the father, although the sons have an abso-"lute right to his property, yet, while their mother lives, "it is illegal to divide that property."

Sir William observed, that the word which he has rendered illegal, is - - - -, which seems to be equivalent to *inofficiosus* in Latin, and to import something more than *not right, or decent,* which is Mr. Halhed's phrase. It

means inconsistent with civil and religious duty. Sir William Jones then read his own translation of an extract from the sacred text of Menu (so he writes the name). It is in these words:—

"After the death *of both father and mother*, the bro-"thers meet, and equally divide the paternal inherit-"ance. While the parents live, they are not masters "of it." Gloss.

From this text it appears, that the brothers of the whole blood must divide the father's estate, *after the death of both parents;* that they cannot, at their own pleasure, divide it, *while the mother is living*, but that a legal division may be made with her assent. If they are desirous of living together undivided, the eldest brother (being of ability to transact business and keep house) shall take her whole, and the other brothers shall live under him, as under their father. So is the text of Menu: "The "eldest brother shall take entire possession of the pater-"nal estate, the others shall live under him as under the "father."

By S'rícrishn'a Tarca'lanca'ra.

Extracted from Mr. Colebrooke's translation of the Mitacshara, p. 224.

(Ante, vol. i. p. 148.)

The order of succession to the property of a deceased man, is this. First, the son inherits; on failure of him, the son's son; in his default, the son's grandson. However, a grandson whose father is dead, and a great-grandson whose father and grandfather are deceased, inherit at once with the son. On failure of descendants down to the son's grandson, the wife inherits: and she, having received her husband's heritage, should take the protection of her husband's family or of her father's, and should use her husband's heritage for the support of life, and make donations and give alms in a moderate degree, for the benefit of her deceased husband; but not dispose of it at her pleasure, like her own peculiar property. If there be no widow, the daughter inherits; in the first place, a maiden daughter; or on failure of such, an affianced daughter: but, if there be none, a married daughter: and she may be one, who has, or is likely to have, male issue; for both these inherit together: but one who is barren, or who is become a widow having no male issue; is incompetent to inherit. On failure of the married daughter, a daughter's son is heir. If there be none, the father succeeds; or, if he be dead, the

mother. If she be deceased, a brother is the successor. In the first place, the uterine (or whole) brother; if there be none, a half brother. But, if the deceased lived in renewed coparcenery with a brother, then, in case of all being of the whole blood, the associated whole brother is heir in the first instance; but, on failure of him, the unassociated whole brother. So, in case of all being of the half blood, the associated half brother inherits in the first place, and on failure of him the unassociated half brother. But, if there be an associated half brother and an unassociated whole brother, then both are equal heirs. In default of brothers, the brother's son is the successor. Here also a nephew of the whole blood inherits in the first instance; and on failure of such, the nephew of the half blood; but, in case of re-union of coheirs, and on the supposition of all being of the whole blood, the associated son of the whole brother is in the first place heir; and, on failure of him, the unassociated nephew of the whole blood: or, on the supposition of all being of the half blood, the associated nephew of the half blood, is the first heir; and, on failure of him, the unassociated nephew. But, if the son of the whole brother be separate, and the son of the half brother associated, both inherit together, like brothers in similar circumstances. If there be no brother's son, the brother's grandson is heir. Here likewise the distinction of the whole blood and half blood, and that of re-united parcenery and disjoined parcenery, must be understood. On failure of the brother's grandson, the father's daughter's son is the successor: whether he be the son of the sister of the whole

blood, or the son of a sister of the half blood. (1) If there be none, the father's own brother is heir; or in default of such, the father's half brother. On failure of these, the succession devolves in order on the son of the father's whole brother, on the son of his half brother, on the grandson of his whole brother, and on the grandson of his half brother. In default of these, the paternal grandfather's daughter's son inherits; and, in this instance also, whether he be son of the father's own sister or son of the father's half sister: and, in like manner, [the whole blood and half blood inherit alike,] in the subsequent instance of the succession devolving on the son of the great grandfather's daughter. On failure of these heirs, the paternal grandfather is the successor. If he be dead, the paternal grandmother inherits. If she be deceased, the paternal grandfather's own brother, his half brother, their sons, and grandsons, and the great grandfather's daughter's son are successively heirs. On failure of all such kindred, who present oblations in which the deceased owner may participate, the succession devolves on the maternal uncle (2) and the rest, who present oblations which the deceased was bound to offer. In default of these, the heritage goes to the son of the owner's maternal aunt. Or, failing him, it passes successively to the son and grandson of the maternal

(1) The son of the proprietor's own sister, and the son of his half sister, have an equal right of inheritance; according to A'CHA'RYA, CHU'D'A'MAN'I, S'RÍCRÌSHNA, *Crama-sangraha*.

(2) The maternal grandfather inherits before his son the maternal uncle, according to the *Dáyatatwa* of RAGHUNANDANA and *Crama-sangraha* of S'RÍCRÌSHNA. See also 3 Dig. 529.

uncle.[1] On failure of these, the right of inheritance accrues to the remote kindred in the descending line, who present the residue of oblations to ancestors with whom the deceased owner may participate; namely, to the grandson's grandson, and other descendants for three generations in succession. In default of these, the inheritance returns to the ascending line of distant kindred, by whom oblations are offered, of which the deceased owner may partake; namely, to the offspring of the paternal grandfather's grandfather and other ancestors, in the order of proximity. On failure of these, the succession devolves on the *Samánódacas*, or kindred allied by a common oblation of water. In default of them, the spiritual preceptor is heir; or, if he be dead, the pupil; or, failing him, the fellow-student in theology. If there be none, the inheritance devolves successively on a person bearing the family name, and on one descended from the same patriarch, in either case being an inhabitant of the same village. On failure of all relatives as here specified, [the property devolves on *Bráhman'as* learned in the three *Védas* and endowed with other requisite qualities:[2] and, in default of such,] the king shall take the escheat, excepting however the property of a *Bráhman'a*. But the priests, who have read the three *Védas* and possess the other requisite qualities, shall take the wealth of a deceased *Bráhman'a*.

So the goods of an anchoret shall devolve on another hermit, considered as his brother, and serving the same

(1) See the note subjoined to this summary.

(2) *Crama-sangraha*.

holy place. In like manner the goods of an ascetick shall be inherited by his virtuous pupil: and the preceptor shall obtain the goods of a professed student. But the wealth of a temporary student is taken by his father or other heir. Such is the abridged statement of the law of inheritance. S'RÍCRĬSHN'A.

Remark by the Translator.

The son and grandson of the maternal uncle ought to precede the son of the maternal aunt, by the analogy of the rule of inheritance on the father's side. But three collated copies of S'RÍCRĬSHN'A's commentary agree in stating the order of succession as here exhibited. On the other hand the same author in his original treatise on inheritance, entitled, *Crama-Sangraha*, exhibits the succession on the mother's side in the following order: "First the maternal grandfather; next the maternal "uncle; then the maternal uncle's son; after him, the "maternal uncle's son's son; and subsequently the "maternal grandfather's daughter's son; [on failure of "these, the maternal great grandfather, his son, his son's "son, his son's grandson, and his daughter's son: again, "on failure of these, the maternal grandfather's grand- "father, his son, his son's son, his son's grandson and his "daughter's son.]"(1) It must be remarked, however, that the text of S'rícrĭshn'a's treatise, according to some copies of it, interposes the mother's sister's son between his maternal uncle and his son. But that is an evident

(1) That part of the text which is enclosed between crotchets is wanting in some copies of the *Crama-sangraha*.

mistake; for the mother's sister's son is the same with the maternal grandfather's daughter's son, who is placed by the same author after the maternal uncle's grandson.

The author of the *Dáya-nirn'aya* states the succession differently: viz. "First the maternal uncle; then the "maternal uncle's son; next the maternal grandfather; "after him, the mother's sister's son; subsequently the "maternal uncle's son's son; and lastly, the maternal "great grandfather." He gives reasons founded on the number of oblations deemed beneficial to the deceased owner.

JAGANNA'T'HA TARCAPANCHA'NANA intimates the opinion, that the son of a son's daughter, or of a grandson's daughter, or of a niece, or of a nephew's daughter, are entitled to the succession before the maternal grandfather. (Digest of Hindu Law, vol. iv. p. 230; or vol. iii. p. 529, 8vo. ed.)

I find nothing else upon the subject in other writers of the *Bengal* school; and amidst this disagreement of authors, I should be inclined to give the preference to the anthority of S'RÍCRÍSHN'A's *Crama-sangraha*; because the order of succession on the mother's side, as there stated, follows the analogy of the rule of inheritance on the father's side. C.

APPENDIX TO CHAP. VII.

ON DISABILITIES TO INHERIT.

ZILLA OF BELLARI.

Santummah, *v.* Tippunnah.

(Ante, vol. i. p. 244.)

The Plaintiff, in her petition, states that she gave her daughter in marriage to the son of the Defendant; who, using her ill, the girl threw herself into a well, and was drowned: upon which she prays that a sum given by her to her daughter, as a marriage portion, may be returned. The Defendant, in his answer, submits that if the parents of a young woman make her any present on her marriage, it is customary to return it at her death, if she leave no male issue; but that, as the girl in question left a son, the action is not maintainable. The Plaintiff, in her reply, admits that had her daughter died a natural death, it would have been so; the property in question would have vested in her son: but insists that the circumstances of her death make the difference, and that the portion should be restored. You are therefore directed to say, whether, according to the Sastra, the Plaintiff is entitled to recover the sum claimed by her, or not?

Answer.

Vrihaspati and Yajnyawalcya, both declare, that any property that has been given to a woman in marriage de-

scends to her issue. The girl in question, *having committed some crime in her former state of existence,* has been punished in this, by dying a violent death. The property notwithstanding given to her by her mother vests in her son.

(Signed) RUNGA CHARY, *Pundit.*

Remark.

There is no colour for pretending that the woman's suicide altered the rule of succession. C.

ZILLA OF CANARA.

Dec. 22, 1809.

(Ante, vol. i. p. 93. 156. 160.)

Hebangoola Puttiah, an inhabitant of the village of Voopenacandoor, in the district of Hoonadapooram, having been expelled from his caste by his caste people, for adultery with a woman of a low tribe, and being deemed in consequence among them as one dead, his wife and children have come to obtain expiation for themselves.—What is the prescribed expiation, according to *Sastra?*

Answer.

If one be dead in law, in consequence of having committed some vile act, the *Dharma Sastra* prescribes to his wife and sons, for expiation, gifts of cows, in the name of the deceased, according to their ability, with ten thousand repetitions of the *Gayatri;* a thousand and seven *Homahs*, with prayers, and sacrifice to *Narayana;* and, according to circumstances, rice, and *Datchana*, and betel should be served.

Remarks.

" According to a passage cited in the *Nirneya Sindhu*, if a man die expelled from his caste, his heir should perform sixteen *prajapatya;* (penance) but, if he leave no issue, his successor must perform ninety *Cuchhra*, or penances termed severe ; (see Menu, ch. xi.) after which,

the obsequies of the deceased are to be performed. This appears then to be an atonement for a deceased sinner not an expiation for the wife and sons; who do not forfeit caste for his sin, unless they continued to associate with him, in which case the expiation would be different."

C.

"I do not see what a court of justice has to do with any *payaschit*,(1) further than to ascertain that it has been duly performed, when, as in cases similar to this, succession to property, or other civil right, may depend upon it."

E.

(1) *Expiation.*—It forms the subject of the third Canda of every original Hindu law book. See Preface to this work, p. xi.

ZILLA OF COMBACONUM.

March 23, 1809.

(Ante, vol. i. p. 93.)

In a case involving a question, how far the carpenters, iron-smiths, and goldsmiths were entitled to perform their rites and ceremonies with the forms of the Veda, and to read the Veda;—upon which the Pundit referred to, holding them to be of the spurious tribes enumerated by Menu, (ch. x. v. 6. 40.) denied their claim;—the case and opinion gave occasion to the following

Remarks.

The study of the Veda, by the 2d and 3d tribes is disused; but it is not forbidden to them.—It is prohibited to the Sudra. C.

This appears to me not to be a case for a court of justice.—It is not a question of Caste, but of Religion; arising out of the peculiar situation of the *Carmâla*, or workers in wood, stone, and metal, in the districts adjacent Madras. The five tribes, of which they are composed, were formerly *Lingad'haris*, and their *Gurus* were *Pundarums*. A few years ago, at the persuasion of some missionary Brahmin (whose name I do not now recollect), some of them thought proper to change their religion. Divesting themselves of the *Lingam*, and being duly invested with the Brahminical thread as *Vaisyas*,

they left their *Tantras*, and betook themselves to the Vedas, and have ever since acknowledged the Brahmins as their Gurus.

How can any of these circumstances be brought into a court of justice? Where, in all the books of Hindu law, is a sentence to be found, from which interference in matters of conscience can be inferred? E.

ZILLA OF BELLARI.

Feb. 6, 1809.

Dacker Bace, *v.* Ulkupah and Jangee.

(Ante, vol. i. p. 161.)

This action is brought by the Plaintiff, (a female,) on the ground, that the Defendants, disclaiming her as belonging any longer to her caste, had refused to eat with her; and she lays her damages for the injury to her character at thirty rupees. Supposing the charge substantiated, what is to be the consequence, according to the law?

Answer.

If any one of the Plaintiff's caste, that have been accustomed to eat with her, refuse without just cause to do so any longer, they are liable to punishment, according to the circumstances of the case.

Remarks.

A passage of Catyayana provides, that if one who ought to associate at meals with another, refuse to do so, without sufficient cause, he shall be fined. C.

Perhaps this was the only mode of bringing the case into the Zilla Court, the regulations not providing for an appeal from the decision of the caste. The answer of the Pundit is right. The Defendants, if guilty of the acts imputed in the plaint, are liable to punishment by the magistrate, not in damages to the individual. The Hindu law knows nothing of discretionary damages. E.

ZILLA OF CHITTORE.

Jan. 5, 1809.

(Ante, vol. i. p. 156. 161. 162. 186.)

If a Hindoo be alleged to have committed an act, for which he is liable to be expelled his caste, how is he to be tried? To whom does it belong to pass sentence upon him? Can his caste eat, or continue their intercourse with him, pending their inquiry?

Answer of the Pundit.

If there be no witness to the conduct imputed, the party must be examined on oath. The examination commences with the priest, the relations of the party, and the caste collectively; and whatever crime they find him to have committed, it is to be referred to the Sastrees; and, upon their being satisfied, the accused is to suffer such penance as they may decree. If he submits and suffers accordingly, he is to be restored to his caste; or rather, he is not to be expelled from it. If he resists, and refuses, the priest, with his relations, should remonstrate, and urge him. If he still persists in his refractoriness, reference should be made to the sovereign, and his funeral rites, with breaking of pots, be solemnized for him, the same as though he were dead; and all intercourse with him discontinued, at the peril of him who, under such circumstances, continues any. If he agrees to submit, a pot of water being put into his hand, he should, without reproach, be directed to offer grass to a cow;—if

the cow grazes on the grass, he is to be received; if otherwise, he must undergo repeated expiation.(1)

Remarks.

"In many of the cases stated in the passages quoted, the persons described are not excluded from society at meals: in others they are expelled from the society of the caste, and none can associate with them at meals, without themselves incurring risk of expulsion." C.

The law referred to is now abrogated; and the Pandit might have saved himself the trouble of quoting it. The words of abrogation are express;—"in the *Caliyuga*, each bears his own sin;" and contamination, therefore, does not follow association with the excommunicated.

As to the principal point, what is generally understood among Europeans by the expression of "turned out of caste," has no legal existence among the Hindoos; that is, there cannot be by law at the present day any positive and final rejection from caste, though, no doubt, frequent instances occur, in which the power is arbitrarily usurped by caste assemblies.

The opinion of the Pundit is good, so far as it goes, according to the old law; but it does not answer the whole of the judge's question, "In what manner is it to be tried, and who is to pass judgment?" The Hindu law recognises the jurisdiction of a number of inferior courts, such as *(Cula, Puga, Sreniti)*,—that formed by persons of the

(1) Menu, ch. XI. 182, 183, 184. 187.

same caste,—that by persons of the same trade or profession,—that formed by the various castes, trades, and professions inhabiting a certain district.—The acts of these courts, in cases arising properly under their cognizance, are, in all, as valid as if passed by the King's courts, and may be enforced in like manner; but the law allows an appeal from them all to the King's courts.—It is correctly stated, therefore, that examination should be made by the caste collectively, but that final judgment belongs to the King's court, by which any act of the collective caste may be superseded. An expiation is appointed for every possible offence, for which a man is dismissible from his caste; which, being duly performed, he must be re-admitted. E

ZILLA OF GANJAM.

November, 1805.

(Ante, vol. i. p. 163.)

Question.

Among the Hindoos, can a family woman be degraded by her own caste, on a charge of adultery, sufficiently proved? And, if she can, how far is she readmissible?

Answer.

If adultery be proved against a Hindu woman, she is liable to be degraded, unless the accusation can be traced to malice. With the exception of the tribe of *Charana*, (or dancing women,) it is ordained of Hindu women in general, in all the *Dharma Sastras*, in the chapter entitled *Stree Pundharma*, that the husband should guard the conduct of his wife; and that, on her being convicted of such a crime, she is to be expelled society. The law is applicable alike to Brahmins, Cshatryas, Vaisyas, and Sudras; but not to persons of illegitimate and spurious birth, who are more under the control of custom, and the discretion of their relatives. And, if the relatives of a woman, who has been so convicted, should admit her into the family, they also would be reprehensible. The general customs of the Hindoos concur in these respects with the law.

(Signed) C. VARADACHARLOO, *Pandit.*

Remark.

This opinion is accurate;—and one degraded from class, that is, an outcast, is excluded from inheritance.

S.

ZILLA OF DARAPOORAM.

May 9, 1807.

(Ante, vol. i. p. 136. 163.)

A married woman having formed a connexion with a stranger, her husband, without any judicial inquiry into her conduct, turned her out of doors; and she never returned to him during his life. He dying without male issue, is she, under these circumstances, entitled to succeed to his estate?

Answer.

If, instead of bringing to a public test, the suspicion he might have reason to entertain of his wife, the husband turns her out of doors, and the matter rests here, her rights remain entire. But she should be provided with proofs of her innocence.

(Signed) SINGARY SANKARA, *Sastree.*

Remarks.

A wife guilty of incontinency is debarred from the right of inheriting from her husband. (Mitacshara on Inh. ch. ii. sect. i. § 37.) It cannot be indispensable that the husband should proclaim her dishonour, and his own. In the case, as stated, it appears that he did resent her misconduct; and the passage referred to shews that presumption of guilt suffices for her disinheritson. C.

Unless the next heir prove her guilt, she succeeds to the property. Never having returned to her husband's house, what was she doing all the while? She is not to answer the question. This rests with him who claims to supersede her. E.

TRITCHINOPOLY PROVINCIAL COURT.

December 30, 1809.

(Ante, vol. i. p. 136. 156. 164. 244.)

A widow, with a daughter, but no son by her deceased husband, having taken possession of his estate, is squandering it, being proved to be a bad character.—What says the law in such a case?

Answer.

Though a widow should be proved to be vicious, still, in default of male issue, she has a right to her husband's estate, but not to squander it. It is to be employed in charities, and the maintenance of the family; and, for this purpose, and to preserve the rights of the daughter, trustees and a receiver may be appointed.

(Signed)
TREVALOOR APPENGAR, *Pundit.*

Remarks.

An unchaste woman is excluded from the inheritance of her husband. See Mit. on Inh. ch. ii. sect. i. 30. 37. But no misconduct, other than incontinency, operates disinherison; nor, after the property has vested by inheritance, does she forfeit it, unless for loss of caste, unexpiated by penance, and unredeemed by atonement. The husband's kin are the guardians of the widow; or, in default of *Sapindas* of her husband, the kin of her own

father are so. They have power to control her lavish expenditure, and improvident gifts. Nareda, 2 Dig. 384. See Yajnyawalcya, cited by Jagannatha, Id. 381. C.

The wife does not succeed, unless she be chaste. This is a necessary condition; but in all cases she is entitled to a maintenance. In this case, the daughter, on proof of the unchastity of the mother, would take the estate; and, under the direction of her natural protector, support her mother. In the event of the failure of near kinsmen, the king is her natural protector; and, in this case, a receiver might be appointed; not otherwise.

E.

APPENDIX TO CHAP. VIII.

ON CHARGES UPON THE INHERITANCE.

ZILLA OF VIZAGAPATAM.

Feb. 1, 1807.

(Ante, vol. i. p. 167.)

Questions.

1. Is the son bound to discharge a debt contracted by the father?

2. The father having in his lifetime given his son a release, exonerating him from his debts, and living separately from him, is the son still liable notwithstanding?

3. Is the obligation personal, or does it depend on the father having left assets?

Answer.

1. It is incumbent on the son to repay money borrowed by the father for the support, or on account of the necessities of the family.

2. But not in the case of a release as stated; the father having survived, for a length of time, the division of families.

3. The general obligation is independent of assets.

(Signed)

DUSKY NARRAIN SASTROOLOO, *Pundit.*

Remarks.

1. It is so, if he were a member of the family having made no partition, nor accepted a separate portion.

2, and 3. Without assets, the son is under a moral and religious, not a civil obligation to pay his father's debts, according to the remark of Sir William Jones. See Jagannatha's Dig. b. i. clxvii. Sir W. Jones's note. This is inferable from the reason given for the son's liability, which is entirely a religious one. See Nareda, cited by Jagannatha, Dig. b. i. cxciv. A reason of a temporal nature might be supposed in the son's participation in the father's wealth, from the moment of his birth. Being in a sort of family partnership with his father, he might be held liable for debts contracted by the father, as manager of that partnership. This, however, was not in the contemplation of the Hindu legislators; else, the grandson, and great-grandson should be held equally liable, if born before the demise of the debtor. But the one is not liable at all; and the other for principal only. Jagannatha's Dig. b. i. cxcvii. It is then a moral obligation only, to pay a debt contracted by the father for his separate account. But one contracted by him for the common concern, binds his sons, &c. who were not previously separated by a partition of effects and debts.

It should however be remarked, that, to exonerate himself from payment of debts, the son must decline the succession to the patrimony. By so doing the burden is left upon the property. See passages in Jagannatha, b. i. clxxi. &c. An insolvent estate being thus aban-

doned to the creditors, is taken by them alone; and no one renders himself liable for debts without assets.

C.

"The Pundit to whom the above questions were re-
"ferred is generally right. The law stated in answer to
"the last of the three seems hard, but it is the law.
"*Pita runavar Vatra*;—'a father in debt is an enemy
"'to his son,' says the Sanscrit proverb." E.

ZILLA OF BELLARI.

July 1, 1807.

Timmanah, *v.* Veneapah.

(Ante, vol. i. p. 167. 192.)

The Defendant having contracted a debt, which he was unable to pay, it was referred to the Pundit, to say, whether the son was answerable for it in the lifetime of the father, no division of property having taken place between them, and the father insolvent, while the son was able to pay.

Answer.

The son, if he have means, must pay his father's debt. If the son be dead, the grandson is answerable. The responsibility applies to the case of the father's absence in another country, or insolvency, as well as to that of his death.

(Signed)

Remark.

"See Yajnyawalcya, cited by Jagannatha, Dig. b. i. clxx. &c. with the commentary. It is not expressly said that the debt shall be paid by the son, in the life-time of his father, who is insolvent. It is declared, however, that he shall pay the debt of the father who is

oppressed by calamity, such as incurable disease, &c. and that, even though no patrimony have come into his hands. But, according to the remark of Sir William Jones, the obligation is moral and religious, not civil." See note on Jagannatha, Dig. b. i. clxvii. C.

ZILLA OF COMBACONUM.

(Ante, vol. i. p. 167.)

The Defendant, a widow, is sued for a debt contracted by her husband's father, who is dead; her husband being also dead, having left a son, who however is only an infant.—Is the action maintainable against the grandson?

Answer.

Failing the son, the grandson of him who contracted the debt is liable; consequently the infant alluded to, when he comes of age.

Remark.

" Provided the father's estate be not possessed by an-" other; (Jagannatha's Dig. b. i. clxxi. &c.) or, if " there be no assets, provided the grandson were not " separated from the family partnership:—and, at all " events, being a minor, he cannot be called upon to pay " the debt, until he have attained the age of sixteen." Catyayana, cited by Jagannatha, Dig. b. i. clxxxvii. " Nor is he liable for interest payable out of his own " funds." (Id. cxcvii.) C.

ZILLA OF VIZAGAPATAM.

August 24, 1807.

(Ante, vol. i. p. 166.)

One indebted having died leaving a widow, but no children, is the widow liable for the debt of the deceased generally, or subject only to her possessing assets?

Answer.

If the debt in question arose from money borrowed by the husband for the support, or other indispensable purposes of the family; and if, at the time of his death, he got his wife to agree to repay it, or if the husband's property be sufficient to discharge the debt, and also to supply her with food and clothing, in either of these cases she will be liable; otherwise not.

(Signed)

D. NARRAIN SASTREE, *Pundit.*

Remarks.

A woman is not in general liable for the debts of her husband. See passages quoted in Jagannatha's Dig. b. i. ccvii. &c. But, if she, or any other person, possess assets of the debtor, his debts must be discharged out of such funds; (ibid. ccxx.) and this, whether enough remain for her maintenance, or not.

The case of her undertaking for the debt would be a special one; but it is not so stated in the question.

C.

If a wife, possessing separate property, render it by special agreement liable for a debt contracted by her husband, she must, in his default, pay it. Or, if she have possessed herself of her husband's property, she is liable to that extent for his debts. A widow is liable in these two cases only. The *Sastri* considers the claim of the widow to subsistence from the husband's estate, as preferable to the claim of his creditors; and, as he is confessedly, one of the most respectable of those, whose names are found in these papers, the presumption is that he is right, though, for this part of his opinion, I know not whence he derives his authority.

E.

ZILLA OF BELLARI.

January 16, 1808.

Erapah, *v*. Ackummah.

(Ante, vol. i. p. 166.)

Moodapah, paternal nephew to the Defendant's husband deceased, having borrowed money of the Plaintiff, for which he gave him a written promise, died, leaving what property he had in the hands of Defendant, whose husband, together with Moodapah, formed, while living, an undivided family. Is the action maintainable against the Defendant, the widow?

Answer.

It is.

Remark.

Assets are to be pursued, into whatever hands. See Nareda, cited by Jagannatha, Dig. b. i. clxxii. and innumerable other authorities may be cited, were it requisite in so plain a case. C.

ZILLA OF BELLARI.

April 2, 1808.

Yerrummah, *v.* Sinjevoo.

(Ante, vol. i. p. 168.)

The Defendant's elder brother, Terumalyah, having failed in an engagement to pay to the Plaintiff, by instalments, the amount of Defendant's bond, the Plaintiff sues the latter upon the original obligation.

The Defendant's answer is, that, upon the Plaintiff importuning him for payment, the debt was transferred, and made payable by his brother Terumalyah; and the sum having been borrowed while Defendant and his brother lived together, the latter has become the debtor, in discharge of the Defendant.

The bond remaining in the possession of the Plaintiff, whether, under these circumstances it be recoverable against the Defendant, is the question.

The Pundit's Answer.

Though the debt was contracted while the brothers lived together, still the bond being the Defendants, and not appearing to have been adjusted on partition between them, the action is maintainable.

(Signed)

Remarks.

The law directs the debts as well as effects to be divided. Mit. on Inh. ch. i. sect. iii. 1. 9. This, how-

ever, is an adjustment among the parceners, which cannot bar the Plaintiff's remedy against all, or any of the debtors, who were jointly bound; or against his particular debtor, if it were a separate debt. C.

Forbearance, in favour of the Defendant, was a good consideration for the engagement entered into by the elder brother. But that would not discharge the Defendant, unless it appeared to have been the intention of the parties, that he should be released. T. A. S.

ZILLA OF CUDDAPAH.

Feb. 13, 1808.

Gungoo Chitty, *v.* Bauliah and Others.

(Ante, vol. i. p. 170.)

A father, having made division in his lifetime among his sons by different wives, how, by law, are his *Sraadums*, or ceremonies, to be performed for him after his death?

Answer.

([1]) Whether by different mothers, or by the same, under the circumstances stated, all the brothers should meet, and perform together the funeral rites and ceremonies of their deceased father, from his burning till the sixteenth day from his death;—the expense to be borne in common. All future ones are to be performed by each separately. (Signed)

Remark.

Correct. C.

(1) Post, p. 351.

ZILLA OF CHINGLEPUT.

July 5, 1808.

Permal Reddy, *v.* Maurepa R. and Tanapah R.

(Ante, vol. i. p. 171.)

The parties are descended from a common ancestor, the Plaintiff being the grandson, the Defendants the sons of Singapah Reddy;—the Plaintiff's father (Mootapah) by one wife, the Defendants by a different one—having lived together as an undivided family, and the Plaintiff's father being recently dead, a partition is now desired. A schedule of the property accompanying, the 1st Question is, What parts of it are divisible; and what share does the Plaintiff take? 2dly, Is he entitled to a provision for his marriage, independent of his share?

Answer.

Deducting the jewels (1) that have been worn by the Plaintiff, the Defendants, their wives, sons, and daughters, and their respective apparel, the property of the common ancestor Singapah Reddy, should be divided into three shares; of which the Plaintiff will be entitled to one, in right of his father; (2) and the Defendants, in their own right, severally, to the other two. The Plaintiff being a nephew, (3) and not a brother, the expenses of his marriage are not chargeable upon the common stock.

(Signed) CRISHNAMA CHARYA.

Remarks.

([1]) See Mit. on Inh. ch. i. sect. iv. § 19. ([2]) See Id. ch. i. sect. v. § 2. ([3]) See Id. ch. i. sect. vii. § 4. Where the initiatory ceremonies, terminating with marriage, are directed to be performed for brothers, but without any mention of nephews. C.

ZILLA OF SALEM.

January 2, 1808.

Kylapa Counden,

v.

Nallaya Counden, Cooty Counden, and Chingada Counden.

(Ante, vol. i. p. 171.)

The parties are four brothers, two of whom are unmarried; and there are also belonging to the family two unmarried sisters, and a mother. The property belonging to them being undivided, the Plaintiff sues for a partition. What is the extent of his right?

Answer.

The unmarried brothers and sisters should be first married out of the joint stock. What will remain of the patrimony, with the additions that have been made to it, being divided into six parts, and one of these sub-divided by four, two of the latter should be given to the unmarried girls; and, from the remaining five shares and a half, the expenses requisite for the weddings of the two unmarried brothers, with a portion for the maintenance of the mother, being first deducted, the Plaintiff will be entitled to a fourth of the residue.

(Signed) SINGANA CHARIAR, *Pundit.*

Remarks.

See Mitacshara, ch. i. sect. vii. § 2, 3.

The allotment of a quarter of a share for the nuptials of an unmarried sister, (Ibid. 5, et seq.) is explained by the Chandrica and Madhaveya, as intending only a sufficiency for the charges of her marriage. C.

I do not quite understand the reason of this mode of division, nor the mode itself. If it be meant that, setting off one share for the four brothers, one for the mother, and one for the two sisters, as the measure of their marriage expenses, to be divided between them, it is sufficiently correct. But, what does the Pundit mean by dividing this share into four parts? Provision should be made for the marriage of younger brothers, if the elders are already married, before division;—this part of the opinion is correct. E.

ZILLA OF CHINGLEPUT.

May 21, 1803.

(Ante, vol. i. p. 171.)

To the Pundit.

The father being dead, leaving a widow, and infant son, with property, the son and estate being in the hands of a brother of the deceased, the widow demands the custody of the one and the other. You will say, who is entitled to it, and whether the son be compellable to live with his mother, or may choose with whom to live.

Answer.

The estate is the son's, out of which the widow of the deceased is only entitled to be maintained. The son is not compellable to live with his mother; it is rather her duty to live with him.

(Signed)

TEROOMALY KISTNAMA CHARIAR, *Pundit.*

Remark.

The sovereign is the guardian of minors. (3 Digest, 542.) The mother cannot claim a share, but a maintenance merely, from an only son; her right to a specific allotment arising only when a partition is made. C.

ZILLA OF NELLORE.

(Ante, vol. i. p. 171.)

By the Pundit.

If there be undivided brothers, and one die, leaving a widow and a son, they succeed to his share of the joint property.

Remarks.

(Mr. Colebrooke's remark upon this missing.)

As long as the family continues undivided, all the parceners, their wives, and families, are entitled to a joint maintenance: on division, widows, wives, and children can claim only on the portion of their respective husbands and fathers. In the present case, if the son were alive at the time of division, his mother would have to look to him alone for maintenance: if he were dead, she could be entitled, in right at once both of her husband and son, to succeed to a full share of the estate; that is to say, a full share should be the *maximum* allowed her. (1) If litigation take place, it is the measure to be adopted by the Court; not that the dividing parties are bound to give her so much, if they can prevail on her to take less; nor any share at all, if they can provide among themselves for her maintenance. Such at least I conceive to be the correct doctrine; whether her dominion over the property be limited, or otherwise, is another question.

E.

(1) Vid. Infr. p. 297.—E.

ZILLA OF CUDDAPAH.

Bussarummah, *v.* Veerapah.

(Ante, vol. i. p. 171.)

The question here is between a mother and her sons, as to the mother's rights.

The Plaintiff Bussarummah's husband died forty years ago, having amassed in his life, and left an estate, in ready money and jewels, to the amount of about 5000 pagodas. Upon his death, she took possession of his property, delivering it over, as she alleges, to her four sons on their coming of age. Of this there is no evidence, and it is denied by her son the Defendant. She further represents that, about fifteen years ago, she went to Jingalapillay to demand her share, sitting down for the purpose at the house of the Defendant, and that at that time the matter was accommodated by an agreement in writing, purporting that she was to have one share, the estate being divided into five. Two witnesses for the Plaintiff declare that, while she was sitting at her son's house, to enforce her claim, a written settlement took place, but that from the length of time since, they could give no account of its contents. Another stated that he, at the request of her son Mullanah, went and invited her to a wedding; to which she refusing to go, he signed a paper, promising to obtain for her 300 pagodas; upon which she attended: that after it was over, and the guests gone, she reminded him of his promise; upon which he wrote to the Defendant

to pay the 300 pagodas according to agreement, and gave the letter to her to carry; but that whether the money was paid or not, he could not say. The Plaintiff moreover represented that the Defendant had ordered her to be put upon a cot, and thrown into the woods; in proof of which she called four witnesses, who testified that the Defendant had put his mother on a cot, and sent her to a village about a quarter of a mile distant from his house; but denied the order for her being thrown into the woods. The Defendant stated that the 300 pagodas had been paid by his younger brother, and that the Plaintiff, having the option, had refused to live in their house. Under this uncertainty of the evidence, what should the sons be deemed to give the mother, according to Dharma Sastra?

Answer of the Sastree.

(Slokums in Sanscrit.)

According to these Ditta of Gautama Smriti, &c. women have no right to Daya Bhaga, or shares of a family estate. But they stand opposed by others.

(Slokum of Yajnyawalcya,
Slokum of Catyayana,
Slokum of Vyasa).

According to these, the mother shares equally with the sons, whether the division take place in the time of the father, or afterwards in that of the sons. The mistake lies in qualifying her right to participate, as a right to share.

(Another Slokum.)

According to this, she is entitled to as much only as will enable her to give rice with alms to poor strangers, and for her food and raiment. Thus the expression of an equal share with the sons resolves itself into a particular portion of money in the division of the estate by the sons; not that she takes an equal proportion with them. It is so held by Jagannatha-turca-punchanana; who declares that the son is bound to provide his mother with maintenance only, and no more. In the present case, though the wealth of the Defendant be considerable, he is bound to allow his mother for food and raiment only, and he is under no further obligation.

(Signed)

Remarks.

This opinion is conformable to the doctrine of the Smriti Chandrica, where it is affirmed, on the authority of a passage of Baudhayana, (in which a text of the Taittinyaca veda is cited, declaring women incapable of inheritance,) that the mother shall not take a share as of heritage, but an allotment adequate to her wants, and not exceeding in the whole the amount of a son's share, including what she may possess, as her peculiar property. This position is however contravened in the *Madhaveya*,(1) a work understood to be of great authority in the South of India, and which seems, in this instance, entitled to a preference over the Smriti Chandrica. The reference to Jagannatha's Digest does not appear to be correct. It is

(1) And vide, Infra, p. 297.—E.

there maintained (see Translation, vol. iii. p. 12, and 30.) that the mother may exact from her sons, making a partition, an equal share with them; and that it is only through maternal tenderness that this right is in present times foregone. C.

The widow's title is to maintenance; (1) the ultimate measure of which is, according to all the authorities, a share. E.

(1) Vid. Infr. p. 297. E.

ZILLA OF VIZAGAPATAM.

Jan. 23, 1810.

(Ante, vol. i. p. 171.)

Two brothers, of the Cshatrya tribe, being about to divide, after his death, the estate of their father, the question is, as to the rights of the mother, who claims to share with them. They contend that she is entitled only to a maintenance. To what, in this tribe, is she entitled?

Answer.

The mother has by law no right to share with her sons. She is entitled to her *Stridhana*, and, if there be land yielding an annual produce, to as much of it as will suffice, to be settled upon her for a maintenance.

(Signed) DUSKY NARRAIN, *Sastree.*

Remark.

The law provides, that when partition takes place among brothers, the mother shall have an allotment made up to her, equal to a full share. There is no distinction in this respect among the different tribes. C.

ZILLA OF DARAPOORAM.

February 19, 1807.

Vencatamah,

v.

Trevengada Chary, and Ragoonada Chary.

(Ante, vol. i. p. 121. 171.)

The Plaintiff is a childless widow. The defendants are the half brothers, by the same father, to her deceased husband. What are her rights, as against the Defendants?

Answer.

She is entitled to demand of them as much as will provide her in food and raiment, with sufficient for the *Sraadum*, or annual ceremony of her husband.

Remarks.

They are bound to maintain her. See Nareda, cited in Mitacsh. on Inh. ch. ii. sect. i. § 7. C.

This is *not* the law of the *Smritis*. It is the convenient law of more modern commentators, endeavoured to be supported by proposing alterations in the original texts, for which there is no foundation. In recent times, however, when the operation of the Hindu law had been interrupted, and none other established in its stead, the nefarious practice of the males of the family seizing all the property of it, and reducing the females to a state

little short of slavery, came gradually to prevail; which practice, as appears throughout these papers, the present race of Pundits are sufficiently inclined to support.[1]

The correct doctrine is, that a widow succeeds to the "entire share" (*critsnam ansam*) of her husband immediately, if partition have taken place; eventually, if it have not. What then is the situation of a widow of a coparcener during the time the family continue undivided? Is she merely entitled to a maintenance? No—she is in the situation of her deceased husband; and is entitled to the use of the joint property, to the full extent that he was entitled to it, remembering always that, as a female, she is under the *protection* of her natural guardians.

([2]) "*Critsnam ansam*," the entire *share*. This expression is read by some *critsnam artham*, the "entire "*estate*;" and, on this reading, it is maintained that the widow takes the estate of her deceased husband, in the event only of previous partition. But this is confuted by the better jurists. E.

(1) To this purpose, see, printed at Calcutta, in 1823, "Brief Remarks, regarding modern Encroachments on the ancient Rights of Females, according to the Hindu Law of Inheritance; by Rammohun Roy." And, vid. supr. p. 291. E. & 294. C.

(2) See Jim. Vah. ch. XI. sect. i. 7, note.

Extract from a Note of the case of Exparte Janaky Ummah, in the Supreme Court of Madras, 1814: *communicated by Sir John Anstruther, Ch. J.—See Notes of Cases at Madras,* vol. p. Ed. 1827.

(Ante, vol. i. p. 171.)

THE Master, by his report, dated the 12th of May, 1815, (reciting the order of reference,) having ascertained the relation of the parties; that Janaky Ummah, the Petitioner, had, subsequent to the death of her husband, in October, 1810, been maintained by her step-son Ramasamy, deceased; that Coopamah, the widow of Ramasamy, had succeeded to his property, amounting to about pagodas, and that the Petitioner had no property to signify of her own; reported five pagodas monthly to be, in his opinion, a reasonable sum to be allowed her out of the estate of Ramasamy, to commence from the 7th of October, 1810, the period of his death, and to continue during her life, together with a house valued at three hundred pagodas. The Master stated, that, in settling the amount to be allowed, he had, pursuant to the order of reference, examined for the purpose respectable heads of families; and he concluded by expressing his opinion, that the house, with the allowance proposed, were sufficient and suitable for the maintenance (including every necessary provision) of the Petitioner and her dependants, whom he found to be her daughter, a Brahmin to offer supplications, and a servant.

" The order of reference was, I think, defective, in not " directing the Master to provide for the payment of the " allowance to be made, either by assigning a sufficient " sum in trust for the purpose, or by obtaining some other " adequate security. There are, I believe, three modes " in practice. One is, to estimate the value of the main- " tenance to be allowed, and to give the widow a sum. " Another is, to invest a sum in trust for the payment of " it. A third, to assign a portion of land for the purpose " revertible to the estate, after the death of the widow. " Sometimes Company's paper is deposited, the interest " of which is equal to the allowance. This must be the " most beneficial provision for the widow."

Subjoined to the above note is the following answer to an inquiry on the subject, addressed to Sir John Anstruther. The answer was dated Calcutta, May 16, 1804.

" At first, a good deal of difficulty was experienced by " always referring to Brahmins. All agree that mainte- " nance must bear some degree of relation to the amount " of the property. The Brahmins, who are universally " the directors of all widows, and especially of the rich " ones, when the question was referred to them, stating " the amount of the property, and the situation, invariably " represented a large allowance as necessary for the " widow, and especially for religious purposes. Misled " by these reports, the allowances were large. The peo- " ple, however, represented against this, and truly, that " the state of widowhood, by the Hindu religion was, as

"it really is, a state of degradation and penance, with "which large allowances were inconsistent: that they "had the effect of throwing widows into the hands of "designing men, who enticed them from their families, "from whom they lived apart, to the disgrace of both;— "that many of the supposed religious ceremonies were "either performed by the family, and not by the widow, "or, if performed by her, were properly performed at a "small expense. Finding these representations to be "true, the course since pursued has been, to take the "sum usually allowed by respectable families, in the same "situation, who live well with their mother and relations. "With us, the Master frames his report on their examina-"tions. By this means they have been much reduced, "and are now low, although they still bear some relation "to the amount of the estate;—but an evil of a very "serious tendency has been entirely stopped. The mode "of securing it is various. Sometimes we set apart a "sum in the Accountant General's hands; sometimes we "take security. The country Courts do the same. I "shall send you Mr. Blaquiere's opinion in a few days. "I have desired him, with his Pundits, to go more at "large into the question, with the authorities, than I "could."

Opinion of Mr. Blaquiere, as subsequently communicated to Sir John Anstruther.

"The amount allowed for the maintenance of a widow "should be in proportion to her wants, that is, sufficient

" for her own support, and that of those immediately " dependant on her. The means of the estate must be " considered, and the general circumstances of the parti- " cular case the guide for settling the amount of the " maintenance, there being no fixed rate or proportion " laid down."

ZILLA OF SALEM.

Gooruvummall, *v.* Vidy Jyen.

(Ante, vol. i. p. 171.)

The humble address of the eight arbitrators, viz. Salem Jeggy Sastry, Alagary Jyenger, Camara pollum Rung-yen, Samien, Coonatver Sheshien, Vellore Vangadattan, Codimadi Soobien, and Paupien.

Whereas, according to the order of the Court, we, the eight persons above named, having maturely deliberated upon the differences between the Plaintiff Yalapoor Gooruvummall, and the Defendant Vidy Jyen of this place, about the maintenance claimed by her; and having sent for the said Gooruvummall, and the said Vidy Jyen, heard their declarations, and considered their circumstances; we award, as to the subsistence that Vidy Jyen should continue to furnish to the Plaintiff Gooruvummall, as follows: viz. He must allow her for paddy, including contingent expenses for her victuals during her life, at the rate of three rupees a month, amounting to thirty-six rupees a year.—For one annual Sraadum for her husband, and another for her son-in-law, at the rate of five rupees for each, making ten rupees.—Four rupees for a cloth; and, as she has two daughters, at the rate of one-fourth of a rupee for turmerick and cooncomum for them; total annual amount, fifty rupees and one-fourth, which ought to be paid her every month at the rate of four rupees, and three sixteenths, per month. In whatever month it be not

paid she will be deprived of her livelihood for that month: therefore it should be paid in ready-money every month. With regard to her residence, a portion of the family house toward the west should be set apart, and assigned her. The Defendant Vidy Jyen ought to attend with her, and perform the annual *Sraadum* for her husband. This appearing to be just and equitable, we have awarded accordingly.

By direction of the Arbitrators,
(Signed) VELLORE ANUNTA CHARY.

The award of the Arbitrators in favour of Gooruvummal being proper, I approve of it.

(Signed) T. SINGARA CHARY.

Remark.

What relation the Defendant is to the Plaintiff's deceased husband does not appear:—it is to be presumed a brother, nephew, or cousin, with whom he lived as member of an undivided family. In which case, the Plaintiff's right of maintenance is comformable to the passage of Nareda, in the Mit. on Inh. ch. ii. sect. i. 7.

C.

ZILLA OF NELLORE.

(Ante, vol. i. p. 72. 172.)

If a man die leaving a widow and two sons, she and they are to take possession of the estate; but if she have any *Stridhana*, she is entitled only to half a share; otherwise, she shares equally with her sons. If the sons are minors, and the person appointed to be their guardian embezzle the property, the widow, with their concurrence, may authorize her father to take the management out of his hands.

Remarks.

(Referring, as to the widow's right of sharing, to former "remarks" on the same point.) If the guardian abuse his trust, no doubt, he should be removed. It is the duty of the sovereign to provide for the care of the property of minors. (3 Dig. 542.) The law has not assigned any power to the mother in this respect.

C.

The widow is entitled to a maintenance, the measure of which is an equal share of the estate with the rest of the coparceners. If she have property of her own, not consisting merely in jewels, clothes, ornaments, and the like, but from which an income is derivable, in this case, it is to be made up equal to a share, without reference to any fanciful division of halves or quarters, of which the Pundits (mistaking the explanatory language of the law,

as "she shall otherwise receive a half or a quarter" for positive injunction) are so fond. I say above "from "which an income is derivable." I cannot just now refer to my authority for this, as I have not my books at hand; but it is the sense of the law. The law says, she shall have a maintenance; but it is not required that either the family stock, or her own, shall be reduced to afford it. It is clearly meant, that it shall be a maintenance by income: if therefore she have no property, from which she can derive income without destroying the property she is entitled to a full share. E.

ZILLA OF NELLORE.

By the Pundit.

(Ante, vol. i. p. 172.)

On the death of a Brahmin, leaving a widow and two sons, she and they take possession of his estate, subject to her possession of *Stridhana*, in which case she is entitled only to a half share.

Remarks.

This is taken from the Mitacshara, on Inh. ch. i. sect. vii. 2. The Chandrica explains that her allotment, including her separate property, must be made equal to a full share. C.

This opinion is generally correct, but I do not understand either the authority or the reason for restricting the maintenance to the amount of half a share, in case of the existence of *Stridhana*. The division (as it appears to me) *should be made without reference to any property she may hold under this title*, unless it may have been accepted by her, with consent of the parties concerned, in lieu of other claims; and in this case it is evident she is entitled to no further share in the event of division. The widow's claim to maintenance from her husband's estate is absolute, unlimited by circumstances; but then it is only a claim to maintenance, and it is not correct to say, that she is entitled to any share or division. This makes

no alteration in her right, it is still maintenance only to which she is entitled; but to this some legal measure must be assigned, and the correct opinion seems to be, that it shall be the amount of a full share as received by the coparceners, or perhaps this may be considered as its *maximum*. This is of course applicable only where there are male heirs, the widow succeeding by right to the property on failure of such. E.

ZILLA OF VENDACHELLUM.

January 4, 1808.

(Ante, vol. i. p. 172. 244.)

Vencummy, *v.* Govindoo Chitty, and two Others.

The Plaintiff's husband, deceased, and the Defendants were undivided brothers. The deceased having left a son by the Plaintiff, aged four years, she demands a share out of the common estate for herself, and another for her child. To her claim as regards herself, is opposed, 1. The general law of inheritance and partition. 2. Her conduct, to which adultery is imputed. Under these circumstances, what are her rights?

Answer.

There is no ground for the claim of separate shares for herself and her son. The share that is given to the son must maintain his mother. Though she should not conduct herself to the entire satisfaction of her caste people, still she must be subsisted out of the share allotted to her son, who in the mean time, is to continue under her care till he attain his age; nor though she should prove an adulteress, can he refuse to supply her with the necessaries of life.

Remarks.

The son is entitled to the share of his father, who was one of four brothers, (Mit. on Inh. ch. i. sect. v. 2.) and

his mother must be maintained out of his allotment: but the sovereign, or a person selected by his authority, is the guardian of the widow. Brethren are not bound to maintain the unchaste widow of their childless brothers; (Mit. on Inh. ch. ii. sect. i. 7.) nor has any authority been found for imposing it as a civil obligation on the son to maintain his mother, if she be an adulteress. C.

Correct, as to the exclusive right and consequent obligation of the son. I do not think, however, and probably the Pundit does not intend, that the Defendants could be compelled to a division of the estate, until the majority of the child. E.

ZILLA OF CHINGLEPUT.

April 23, 1805.

(Ante, vol. i. p. 172, 173.)

One Ragava Moodely left five sons, of whom three dying without issue, the remaining two left, the one a son, the other a son and a widowed daughter.—How is the estate to be divided?

Answer.

It is to be divided between the two cousins. As to the widow, whatever her father gave her in his lifetime, with whatever she got from her father-in-law, the whole is hers. The parties should perform the ceremonies (*Sraadhum*) for those who died without issue.

(Signed) T. Kistnama Chariar.

Remark.

The law gives nothing to a married daughter, where male issue is left. The claim of an unmarried daughter only is noticed. Mitacsh. on Inh. ch. i. sect. vii. § 14.

C.

ZILLA OF CHINGLEPUT.

April 11, 1805.

(Ante, vol. i. p. 171. 224.)

Viziaragavyengar, *v.* Pommalyengar, Achalyengar, and Others.

The Plaintiff is a son, and the Defendants the brothers of Vurdyengar, deceased; who, together with the Defendants, were the sons of a person of the same name with the Plaintiff; viz. Viziaragavyengar. Viziaragavyengar, the grandfather of the Plaintiff, had two brothers, one of whom adopted his nephew the Defendant Pommalyengar, the other his nephew Achalyengar, another of the Defendants. The Plaintiff has three younger brothers and two unmarried sisters: there never has been any division of property in the family, and the augmentations to it, by the individual members, have been unequal. The Plaintiff claiming a partition, how is it to be made in this case?

Answer.

Unequal gains, by the respective members of an undivided family, using for the purpose the family property make no difference upon partition. It must still be equal.

The grandfather having had two brothers, the property in question should be divided into three parts. The adopted representatives of the two brothers will take their respective shares. The remaining share will be divisible between the Plaintiff, as the son, and the remaining Defendants as the brothers of Vurdyengar; who, together represent Viziaragavyengar, the Plaintiff's grandfather.

The share of Vurdyengar, the father of the Plaintiff, must be divided between the Plaintiff and his younger brothers, who, together with the Plaintiff, are chargeable with the marriage expenses of their sisters, and with their maintenance till marriage.

(Signed) T. KISTNAMA CHARIAR, *Pundit*.

Remarks.

Vijnyaneswara allots to an unmarried sister a quarter of a share. (Mitacsh. on Inh. ch. i. sect. vii. § 5, et seq.) But the Chandrica and Madhavya countenance the opinion, that the specified allotment intends only a sufficiency for the charges of the sister's nuptials; and their authority has been very rightly followed in the one here delivered.

For the authority of the first part of this answer, concerning equal partition, notwithstanding inequality of gains, see Mitacshara on Inh. ch. i. sect. iv. § 31.

C.

This is a peculiar case; and though the mode of division indicated by the Pundit may be liable to doubt, I think it, under the circumstances of the case, correct. Making the division among the ancestors of the parties, instead of the parties themselves, is faulty, wherever it can be avoided. But it must sometimes be done; in this case it is necessary, from the circumstance of the adoption of two of the uncles of the Plaintiff by his grand-uncles; for, had the division been made between the uncles and nephews, as in common cases, these two could not take

as brothers of Vurdyengar, of which character they were deprived by the act of adoption. In order, therefore, to bring them in, it was necessary to ascend a degree higher in the genealogical scale, and to make the first division between their natural and adoptive fathers, to whose respective shares they succeed. E.

APPENDIX TO CHAP. IX.

PARTITION.

ZILLA OF CUDDAPAH.

(Ante, vol. i. p. 177. 183. 194.)

B. Latchemucha, *v.* Visvanada.

THE parties being Brahmins, the Plaintiff is the wife of one Kistnavanee; the Defendant, his brother. At the time of the departure of Kistnavanee from his family, hereafter mentioned, he, and Visvanada (Defendant) having divided their property, each was in possession of his share in severalty; when, in consequence of a bad understanding between Kistnavanee and his wife, (the Plaintiff,) she quitted him, carrying with her two of their sons; upon which he took a second wife. Having subsequently assembled his caste, he procured from them a *samakya*,(1) as a means of constraining her to give him back his sons. This not producing the desired effect, he applied to the priest of the family for a divorce, which was refused, the Plaintiff not being chargeable with any crime. Under these circumstances he subsequently disappeared: nor is it known, with certainty, whether he be now living or dead. On the eve of his withdrawing, he deposited with his brother (the Defendant) the Sunnuds of his

(1) A writing with many signatures to it.

Meerassee, directing him to continue cultivating his *Mauniums*, accounting from time to time for the rents and profits to his *second* wife. He farther directed that, in the event of his *first* restoring his sons, the usual ceremonies being performed for them, they should be taken care of; and that, in this case also, their mother (the Plaintiff) should have food and raiment. Latchemanah, the eldest son, having since come of age, the question is, whether the Plaintiff and he ought not now to be put in possession of the property, the same as if Kistnavanee were dead; or, whether it should be allowed to remain as it is, with the Defendant Visvanada?

Answer.

The property appearing to be ancestral, it vests in the sons, in the absence of the father, subject to the claim of the wives to be maintained. In the event of any disagreement between the sons and their stepmother, the magistrate should interfere, and secure the latter in a reasonable maintenance. Should the father return, it will revest, and, should he and the sons afterwards disagree, they may come to a partition, he concurring.

Remarks.

According to the Mitacshara, sons have interest in the patrimony by birth; and, in property ancestral, have an equal right with their father. (Mit. on Inh. ch. i. sect. i. 27. and sect. v. 3.) The sequel of this opinion, regarding the arrangement to be made in the absence of the father, supposed to be dead, is consistent with the

law: but the son's concurrent interest in the patrimony would not be a reason for disturbing an arrangement made by a father to provide for his absence, if there were reason to believe him still living. C.

The opinion here given seems reasonable enough. The presumption that the husband is dead does not seem to have been yet formed.

As to the question, whether sons have a right to ancestral property, (immoveable,) such as to preclude the father from making any disposition of it, he may choose, it has been decided by the Sudder Adawlut in two cases, viz. in that of *Eshanchund Rai*, v. *Eshorchund*, Beng. Rep. Ante, 1805, p. 2; and in that of *Ramkomar*, v. *Kishenkeenkar*, in 1812; that, in Bengal, a Zemindar may by deed settle the ancestral estate on one son, to the exclusion of the rest. I have, however, heard the law of these cases questioned. The contrary was determined in the case of *Sham Sing*, v. *Umrastee* (a Tirhoot case), July 28, 1813, as the law according to the Mithila authorities. D.[1]

(Ante, vol. i. p. 183.)

I should think the law must fix some period, if not direct, by analogy, within which the father ought to return. If it be to be fixed discretionally, his age and other circumstances should be considered, and a period settled, after the expiration of which the estate should

(1) William Dorin, Esq. one of the Judges of the Sudder Dewanny Adawlut of Bengal.

be made over to the sons, and divided, if they wish it, between them. The father must be taken to have left home as *Saniassy;* and, if he absents himself beyond a reasonable time, the business of the world, and of his family, must not suffer from his caprice. In the mean time, the estate might remain, as the father left it, in deposit, till the sons are grown up; i. e. supposing it to be in safe hands, and well managed. T.(1)

(1) William Thackeray, Esq. deceased; late member of Council at Madras.

ZILLA OF VENDACHELLUM.

Sept. 9, 1807.

Penauka-Paty, *v.* Appauyangar.

(Ante, vol. i. p. 179.)

The sons of a man possessing property inherited by him, claim a division of it, not including the land. The father not assenting, can they compel one?

Answer.

They can compel a division of the land only, according to the *Daya Bhagum,* of Jimuta Vahana; and *Agee vateva Bhagum,*(1) in Jagannatha turka-punchananum.

(Signed) SREENEVASA CHARLOO, *Pundit.*

Remarks.

The answer is expressed too broadly. Under particular circumstances, a division may be exacted by sons, against the consent of their father. Mitacsh. ch. i. sect. ii. 7. C.

"They cannot"—certainly not; the property, barring waste, is absolute in the father during his life. E.

(1) Signifying, division in the lifetime of the father.

ZILLA OF BELLARI.

May 29, 1807.

Turcapah, *v.* Mullashiah.

(Ante, vol. i. p. 179.)

The Plaintiff is one of several sons of the Defendant, of whom, having been turned out of doors by him, he demands his share of the family property.

Is the Defendant compellable to acquiesce in his demand?

Answer.

According to Yajnyawalcya and others, a father, dividing his property among his sons, must allot to the eldest a larger share than to the rest; and, according to Vrihaspati, the wife shares with them, if not provided for by her parents. It is declared by Nareda, that though a son should be earning his own livelihood, not coveting what belongs to his father, still, on a division of property, an allotment should be made him, if only to bar his future claim. In the case referred, the Defendant is bound to allow the Plaintiff the share he demands.

(Signed) RUNGACHAREE, *Pandit.*

Remarks.

None of the circumstances, which could entitle a son to exact a partition from his father, (Mitacsh. ch. i.

sect. ii. § 7.) appear to have existed in the present case. The opinion delivered seems contrary to the law on that point, as well as in regard to the superior share of the eldest son; which Yajnyawalcya declares to be optional with the father in his lifetime; but which he is restricted from granting, if the property be hereditary; and which is altogether obsolete on a partition among brothers. Mit. on Inh. ch. i. sect. ii. § 1. 6. sect. iii. § 4. C.

"Is bound to allow the Plaintiff his share." If he thinks proper to divide his estate, he is so bound, not otherwise. All he is bound to do, during his life, is only to provide his son with a maintenance. After his death, the rejected son may demand a division from his brothers. A father's dominion over the family property is absolute, so long as he does not waste it; of which the magistrate will judge in equity.

Primogeniture has no force in the present age. E.

ZILLA OF BELLARI.

May 26, 1808.

Sarabiah, *v.* Mulliah.

(Ante, vol. i. p. 179.)

The Plaintiff sues for a division, his father being alive. Is he entitled to it?

Answer.

It is declared, by Haneeta, that, while the father lives, the son cannot interfere in the distribution or expenditure of money, in the making of gifts, or the punishing the servants when they deserve it, without the consent of the father. The present suit therefore is not competent.

(Signed) RUNGACHARY.

Remark.

Under particular circumstances, a son may require a division. Mit. on Inh. ch. i. sect. ii. 7. C.

Ante, p. 319. Post, p. 323.

ZILLA OF GANJAM.

(Ante, vol. i. p. 179.)

Can the sons, among the Wodday Brahmins, enforce a division of the family property, during the life of their father?

Answer.

It depends upon whether the property descended from ancestors; in this case, they may: otherwise, if it was acquired by the father.

Remark.

Sons have a right in particular cases only to demand a partition even of ancestral property, during their father's life.—See Mit. on Inh. ch. i. sect. 2. § 7. and Id. ch. i. sect. 2. 7. S.

Ante, p. 322.

SUPREME COURT, CALCUTTA.

(Ante, vol. i. p. 182. 196.)

On the 18th August, 1781, and about a year before his death, Juggulkisson Addic, possessed of property, partly descended, and partly acquired, and having a wife and son, by will executed and attested, disposed of the whole in equal shares between them, and died, leaving them surviving him.—Upon reference to the Pundits of the Court of a long statement, of which the above is the substance,—they certified in favour of the will.

Remarks.

The doctrine of Bengal appears to be thus: A Hindoo has absolute power in the disposition of moveables, however obtained, as well as of his own acquired real estate, whilst his property in the same endures. This is however terminated by his civil or natural death. His civil death is occasioned by degradation from his tribe, entering a religious order, and the like. Therefore, there are two periods for the partition of the property above-mentioned amongst his sons; one at his choice, whilst his property endures, another at the will of the co-heirs, or any of them, when his property has become extinct, as above described. The same principle is applicable to the real ancestral estate, with this difference;—The father has not absolute power over

such property; neither can he, at his choice, make a partition of the same, till the mother is past child-bearing. A partition made by his choice must however be equal; though he may preserve for himself a double share. While the ownership of the father endures, the sons can demand the partition of no description of property. S.

ZILLA OF BELLARI.

July 16, 1808.

Soobummah, *v.* Ginecapah.

(Ante, vol. i. p. 184. 192.)

On a question, as to the liability of the son to be sued, on account of property claimed by the father, the father living and amenable at the time, the Pundit (Rungachary) certified in the negative.

Remarks.

A son can only sue, or defend a suit for his father, unauthorized by him, if the latter be disabled by de crepitude, disease, alienation of mind, or the like. See a passage of Vrihaspati, as follows: "A kinsman "(explained by Mitra Misra to mean a son, or other near "relation), or any person who is delegated by the party, "may institute or defend causes on the part of one who "is an idiot, a madman, an old man, or one afflicted with "disease."—If the father have retired from worldly affairs, the whole management of the family devolves on the son; and in such case he may of course be sued.

C.

Right.—The father has absolute dominion during his life: the children have nothing to do with the property, or the claims on it, till after his decease. E.

ZILLA OF CHITTORE.

Dec. 26, 1810.

(Ante, vol. i. p. 188.)

For the statement and questions referred to the Pundit, vid. post, p. 238.

Answer.

1. It is ordained in the Sastras, that a man living in the same country, offers *Pindu* (rice to deceased forefathers) as far as four degrees of descent; and he has therefore to that extent a right to demand a share of his ancestor's property; but that here it ceases, unless there have been an absence in a distant country, in which case it extends to the seventh degree. The claimant being of the fifth degree in descent from the first possessor, and not appearing to come within the exception, on this ground his claim fails.

(Signed) ALAGA SINGANA CHARIAR.

Remark.

See Devala, cited in 3 Dig. 10; and Vrihaspati, Id. 440. C.

ZILLA OF CHITTORE.

Dec. 26, 1810.

(Ante, vol. i. p. 198. 208. 240.)

The owner of an extensive Jaghire died, leaving two sons, of whom the elder succeeded to it, the younger accepted some villages as his portion. The Jaghire is in possession, by descent, of the great-grandson (by adoption,) of the above-mentioned owner: and the great-grandson, by the younger branch, now sets up his claim to a share of it.

1. Had the claimant's ancestor (the younger brother of the sons above-mentioned) a right to what is now demanded? And, does the claimant represent him in that respect?

2. Admitting the original right, how was it affected by acceptance of the villages referred to?

3. What is the law, as to the divisibility of a Jaghire?

For answers to the two first questions, vid. ante, p. 327.

Pundit's answer to the third question.

As to the divisibility of a Jaghire, it is stated in the *Ramayanum*, *Bharadum*, &c. (ancient books,) that the crown was entailed upon the eldest son; the rest, pro-

vided with means for their livelihood, being left to conquer for themselves new countries. Though, by law, the kingdom might have been divided, yet in their prudence, this course was preferred, it being thought, that if it was given to all, strife would ensue. Therefore, and as prudence prevails often against law, a kingdom is not divisible; it is so settled in many countries.(1)

(Signed)

ALAGA SINGANA CHARIAR, *Pundit.*

Remarks.

This is a very good opinion of *Alaga Singana's.* His confounding the terms *Jagir*, and *Rajiyam*, does not detract from its merit; it only shews that he did not properly understand the former (foreign) word. A *Jagir* is a fief, (it may be hereditary, or not,) held under such conditions, and for the performance of such services, as the granter pleases to prescribe. The *Jagirdar* possesses no powers, except such as are necessary for the collection of the revenues in the country assigned to him, or such as may be specially conferred by the terms of his grant. Such tenure, therefore, can bear no resemblance to what the law calls *Rajiyam*, — the enjoyment of sovereign power, paramount or subordinate. The latter cannot be divided; for division would destroy it; and it is a maxim, that nothing shall be divided which would be destroyed by the act. But the effects and private estate of a sove-

(1) Extracted from 2 Dig. 122.

reign prince may, and ought to be, divided, like the property of others, among his children. E.

(Ante, vol. i. p. 236.)

The succession of Zemindaries has never been regulated by the common Hindu law of inheritance, but by the usage of the country, or the pleasure of government. Had they been divisible, we should not have found so many of ancient date still existing as we do. T.(1)

(1) William Thackeray, Esq. deceased, late member of Council at Madras.

MADRAS.

Sudder Dewanny Adawlut.

(Ante, vol. i. p. 184.)

If a Hindu die, leaving property, can his eldest son, being of age, claim the outstanding balances due to his father, without previous application for the purpose to the coheirs?—Or, must he obtain a *Vakalutnamah* from them, to empower him?

Answer.

The elder brother should consult, on the occasion, such of his younger ones as are of age at the time.

Remarks.

An elder brother may certainly take the management of the whole, with the acquiescence of the coheirs; (Mit. on Inh. ch. i. sect. iii. § 3; and 2 Dig. text ix.) and if the objection be on the part of a debtor, pleading the claimant's want of authority from his coheirs, the plea would be bad; though it is presumed that, if he require, for his satisfaction and security, that all should join in an acquittance for payments made by him, he ought to have that satisfaction. If the objection be on the part of the coheirs, the elder brother (no doubt) cannot act for them, against their consent. C.

"Should consult," &c.—That would be very proper; but what answer is this to the Court's question? It was

meant to ask, whether it be necessary that the elder should receive a formal commission from the other brothers, or whether he may act without it? The answer is, that no formal commission is necessary. The elder brother succeeds naturally, as the representative of the father, to the administration of the estate; but, by common consent, any of the others may do so. In the latter case, a written agreement may be given; but the necessity of one is not even here absolute: the general notoriety of the fact is in all cases sufficient. E.

ZILLA OF BELLARI.

April 22, 1807.

Nedanapatee Vencapah, *v.* Rangapah.

(Ante, vol. i. p. 184.)

The Plaintiff, an inhabitant of Taudaputtree, states, that the Defendant, in the year Durmatty, gave him a bond in the name of his elder brother Sernapah, for pagodas 1135, due on account of clothes purchased: to which the Defendant alleges in answer, that as he did so by the direction of his brother, who is living, the latter should have been made the Defendant. To this the Plaintiff replies, that they are an undivided family, and that the elder brother not being on the spot, and the Defendant having given the bond, though in the name of the elder brother, who received the goods, the action is properly brought.—*Qu.* Is it, under these circumstances, maintainable against the Defendant?

Answer.

According to the Sastras, applicable to an undivided family, the elder brother being alive, though absent, the younger is not answerable.

(Signed) RANGACHARLOO, *Pundit.*

Remarks.

This opinion appears to proceed on the ground of the elder brother being sole manager, and alone per-

sonally responsible for debts contracted on the common account. This would not, however, exempt the joint stock, and younger brother's share of it, from being answerable for the debt. The absence of the elder brother, independently of the circumstance of the debt having been contracted by the younger brother, in the name of the elder, rendered the younger, in this case, even personally amenable.—See 1 Dig. text clxxx. and following gloss. It would be otherwise, if the debt be taken to have been contracted on the separate account of the elder brother; in which case the younger one would not be answerable, in consequence of the absence of the eldest, until the lapse of twenty years. See Id. text clxxv.

C.

Here the letter of the general law is applied, without discrimination, to a particular case. Where was the estate? Did it remain in the management of the younger brother? Whoever is in the management of the joint property, is answerable for all claims upon it, be he elder, or younger. E.

ZILLA OF CHINGLEPUT.

March 31, 1804.

(Ante, vol. i. p. 184.)

Of brothers constituting an undivided family, how far has the elder a power to bind the rest by his bond?

Answer.

If an engagement by an elder brother for a debt specifies, that it is for himself and his brothers, and it appears that he had had the management of the family, it is in force against all.

(Signed) T. KISTNAMA CHARIAR.

Remarks.

Being the managing member of a family partnership, the elder brother had a power to bind his partners for a debt contracted for the concern: and his brothers will be bound by his act, unless they can shew that the debt, though purporting otherwise, was contracted for his separate interest; and that the lender was apprized that it was so. C.

Whoever has the management, elder or younger, binds by his acts the other parceners. E.

ZILLA OF CHINGLEPUT.

August 6, 1806.

Venkatakistnyengar, *v.* Narayen.

(Ante, vol. i. p. 200.)

The Defendant executed a bond, to the Plaintiff's father, for a debt due to him by the father of the Defendant. At the time of executing it, he, (the Defendant,) his younger uncle Caulapa Reddy, and his elder uncle's son Tremala Reddy, were all living together in the same house, undivided: but, three years afterwards, they divided their property, and have since lived separate.

Under these circumstances, is the Defendant liable to pay the whole amount of the bond, or his proportion only?

Answer.

It appearing that the bond, given by the Defendant, for a debt due from his father to the father of the Plaintiff, was for so much borrowed for the common use, while Defendant's father, his brother Caulapa Reddy, and his other brother's son, Tremala Reddy, were living together as an undivided family, and that they afterwards divided, and since live separate, the amount of the debt, so secured, should be paid in the proportions in which the several parties divided the estate; and, consequently, the Defendant is answerable for his proportion only. It is so laid down in the section entitled *Renidana*, (title, Debt,) of

the second chapter, called the Chapter of Causes, in the Dherma Sastra, Vijnyaneswara.

(Signed) T. Kistnama Chary, *Pundit.*

Remarks.

The action seems to have been properly brought against the Defendant; and the Plaintiff should have had judgment against him: leaving him to recover from his uncle, and cousin, their rateable proportions; the debt having been originally contracted for the common concern, and the payment of it not otherwise provided for on the partition.

But, if the son had not entered into a new obligation, the opinion delivered in this case would be correct: as, in such circumstance, the son is answerable only for his father's share of a debt contracted by him, when acting for his coheirs. See Jagannatha's Dig. vol. i. text clxxxii. C.

ZILLA OF CHINGLEPUT.

Kistniengar,

v.

Sreenyvassyengar and Vurdyengar.

(Ante, vol. i. p. 200. 225.)

The Defendants (brothers) divided their estate in 1787, as they pretend. It is proved that, in 1793, Vurdyengar having drawn the bond on which the action is brought, Sreenyvassyengar, the other Defendant, executed it for himself and coparceners; and that part of the money secured by it was taken up to defray the marriage ceremonies of Vurdyengar.

The question is, whether both are answerable in the action, or only one, and which?

Answer.

It appearing that the bond in question was executed by Sreenyvassyengar, for himself and coparceners, on account of money taken up for Vurdyengar's marriage, both are answerable for it, it not being proved that they had previously divided.

(Signed) T. KISTNAMA CHARIAR, *Pandit.*

Remark.

See Jagannatha's Digest, vol. i. text clxxxi. The debt having been contracted during family partnership, in the name of the coparceners, for the common concern, (the marriage of a brother being a charge defrayable out of the joint stock,) it was no doubt recoverable from both brothers. C.

ZILLA OF CUDDAPAH.

Latchemenada, *v.* Visvanada S——.

(Ante, vol. i. p. 200. 225.)

The Defendant, and the husband of the Plaintiff being brothers, and undivided, and their mother dying, the Defendant, in the absence of his brother, made a gift of land on the occasion of her death, equal to two *mercalls* of seeds, to one Annavaraloo Sashumbuttoo; he, the Defendant, being at the time in possession of the family property. *Quest.* Was the gift good as against the absent brother, unauthorized by him?

Answer.

Where one brother has the consent of the others for a present, a sale, or a mortgage, all will be bound by it. In the present case, the gift in question is, as against the absent brother, the same as if it had not been made, notwithstanding the doctrine, that a mother is to her son as a divinity; the effect of which is, that a gift of a man out of his own share, with a view to her salvation, on occasion of a sacrifice offered to her, will be a gift on good consideration: but the Defendant was incapable of making such a one out of lands the property of both, without joint concurrence.

(Signed)

Remarks.

See Mit. on Inh. ch. i. sect. i. § 28, 29. The gift being made for the spiritual benefit of a mother's shade, and, so far as appears, being not excessive for that purpose, according to the religious notions of the parties, seems to come under the description of indispensable duty, for which one brother is competent to make a valid gift, without the consent of the other,—it could not therefore be recalled. The action, however, does not appear to have been brought for this purpose, the donee being no party to the suit; but for that of charging the whole gift against the donor's share of property; in which view also the maxim cited from the Mitacshara is adverse to the Plaintiff's claim, which goes to disallow this disposal of property, as for the common concern. C.

If the husband of the Plaintiff had, during his lifetime, sued the Defendant, he might have recovered; as the bringing of the action would have implied that the alienation was made without his consent. Or, if the Plaintiff had proved, not merely that his consent was not given, but that he refused it at the time of the alienation, or disapproved the act as soon as he was informed it had taken place, then she would have been entitled to recover. But the Hindu law will infer that all charitable acts performed by one parcener, especially one so sacred as that which operates toward the "salvation" of the common mother, are performed on account of, and with the consent of the rest, the contrary not being

shewn; and, in the present case, the contrary is not shewn; as it does not appear that the then living parcener objected to the gift being by his brother, or that he disapproved of it at any subsequent period; had the alienation been made for any common purpose, not charitable, the inference of the law would have been directly the reverse of what I have here stated; it would have been that the absent parcener did not consent, unless the contrary were shewn; in this case it is that, unless the contrary be shewn, he did consent. The Pundit has not sufficiently considered these legal distinctions.

E.

It may be remarked, in addition to the above observations, that, had the Plaintiff's husband been a minor at the time of the grant in question, it would have been clearly good, without his consent, which he would not, during minority, have been competent to give. (Mit. on Inh. ch. i. sect. i. § 28, 29.) It does not appear that he was a minor; but it is stated that he was absent at the time, which would be equally material, as connected with the occasion of the grant; being the death of the mother, whose ceremonies could not conveniently wait. Minors and absentees stand, in many respects, in point of Hindu law, on the same footing. T. A. S.

ZILLA OF NELLORE.

(Ante, vol. i. p. 200.)

By the Pundit.

A younger brother is answerable for a debt contracted by the elder, whether for the support of the family, or for charitable purposes, or on account of their trade; provided the elder be dead, or absent in a distant country. But, all living together, the elder is alone answerable.

Remarks.

A debt contracted by any one brother, living in family partnership, for the support of the family, is binding upon all, in every case. But consent, express or implied, is requisite, in the case of one contracted in course of trade, or for charitable purposes.

The answer, in the present case, supposes the elder brother to be manager for the family. This might exonerate the person of the younger one, but not the property. See 1 Digest, texts clxxx. clxxxi. clxxxii. clxxxiii. C.

"Alone."—The person in management of the estate is answerable. This is not necessarily the elder brother.

E.

MADRAS.

Sudder Dewanny Adawlut.

(Ante, vol. i. p. 200.)

A Hindoo, being in possession of landed and other property, died, leaving two sons, the younger a minor of thirteen years only, at the death of his father. The elder of the two, taking possession of the paternal property, proceeded to borrow successive sums of money, amounting, on a settlement of accounts with the lender, to a sum for which he gave his note, mortgaging, for the payment of it, the family property. The amount exceeds his share of that property. The younger brother was not privy at the time to the contracting of the debt; nor has he ever recognised its validity, so far as his interest is concerned. Neither does it appear that it was incurred on account of the family. Under these circumstances, is it chargeable, beyond the share of the elder brother, on the paternal property?

Answer.

The Sastree, Vencatasa, certified that, under the circumstances stated, the act of the elder brother could not prejudice the rights of the younger.

Remarks.

Extract from a letter (1813) from Mr. Colebrooke, to the then Chief Justice of Madras, upon a suit before

the Court, impeaching the transaction above alluded to;[1] and upon which the preceding reference was made to the Pundits of the Sudder Dewanny Adawlut.

On the subject of the question which you had lately before you, I entirely agree with you, that a mortgage, sale, or gift, by one of several joint owners, without the consent of the rest, is invalid for other's shares. In Bengal law, it is clear, that it is good for his own share; and for that only. In other provinces, it is as clear, that the act is invalid, as it concerns others' shares; and the only doubt, which the subtlety of Hindu reasoning might raise, would be, whether it be maintainable even for his own share, of undivided property. On the two first points, then, as stated by you, the law is undoubtedly as you have viewed it. On the third point, I take the law to be, that the consent of the sharers, express or implied, is indispensable to a valid alienation of joint property, beyond the share of the actual alienor; and that an unauthorized alienation by one of the sharers is invalid, beyond the alienor's share, as against the *alienee*. But consent is implied, and may be presumed in many cases, and, under a variety of circumstances, especially where the management of the joint property, entrusted to the part owner, who disposes of it, implies a power of disposal; or, where he was the only ostensible, or avowed owner; and, generally, when the acts, or even the silence of the other sharers, have given him a credit, and the alienee

(1) See Notes of Cases at Madras, vol. . p. . Ed. 1827.

had not notice. I cannot refer you to authority beyond the passages to which you have already adverted, for this position. I rather consider it to be a point of evidence, what shall suffice to raise the presumption of consent, or acquiescence, than a matter on which the Hindu law has pronounced specifically; and I do not recollect any passages more express, than those to which you have referred, shewing that the alienation is invalid, as against the alienee. The case of Prannath, *v.* Calispunker,(1) to which you refer, was, I conceive, determined on the ground of implied consent; the land being answerable for the revenue, for which the managing owner had engaged, on the part of himself and sharers; besides other peculiar circumstances in the case.

(1) Reports in Sudder D. Adawlut, Bengal, previously to 1805, p. 49. 51.

ZILLA OF COMBACONUM.

Feb. 12, 1807.

Chandranader Moodeliar, *v.* Sashier.

(Ante, vol. i. p. 225.)

Upon examination of the matter in dispute between the parties, it appears that Ramien, the Defendant's brother, borrowed from the Plaintiff two thousand gold *chuckrums;* and that, after his death, Nauna Jyen, another brother, let some villages to the Plaintiff, under an agreement to credit the rent toward liquidating the debt contracted by Ramien, and that, if a balance should remain finally due to the Plaintiff, he, Nauna Jyen, would execute a fresh writing for the amount. Nauna Jyen died three years after; and a balance remaining due, it is required to know, whether the Defendant be answerable for it, he and his brothers never having divided, though they lived separate.

Answer.

Though there never was any division between the Defendant and his brothers, yet, if the Defendant lived alone, unconnected with them, acquiring property independently of the paternal estate, or of aid from them,—distinct, not only in his dealings, but in his offerings also to their common ancestors,—or, if the debt contracted was not for the support of the family, he being connected with it,—in any of these cases, he is not answerable to the

Plaintiff for the balance, unless he should be in possession of assets, belonging to Ramien.

(Signed) VERNOO, *Sastree.*

Remarks.

See Yajnyawalcya and Nareda, cited by Jagannatha, 1 Dig. p. 282. text clxxx. clxxxi. and 3 Dig. text ccclxxi. C.

The circumstances here stated, and many others, indicate either division, or relinquishment of joint property, but do not constitute absolute proof of it. Notwithstanding the proof of such circumstances, the judge ought to satisfy himself that the separation was such as equitably to release the Defendant from responsibility for the acts of his coparceners. Admitting every circumstance indicating division, still, if it appeared that one of the parceners allowed the semblance of an undivided family to exist, either by occasionally asserting, or not denying it when asserted; and that a stranger, actuated by impressions so received, lent money, or formed contracts with the others, a parcener so acting, would be answerable for such debts, and must abide by such contracts. This applies, however, in strictness to brothers only; the natural connexion between cousins, &c. is not so great, and less, therefore, is required to establish their separation. Perhaps sometimes it may be incumbent on the claimant to prove their union, which, among brothers, the law infers.

E.

BOMBAY.

January 23, 1811.

(Ante, vol. i. p. 201.)

Two brothers, possessing a house jointly, the elder executes a contract for the sale of it, in the name of himself, and his absent brother; and deposits it with a third person, on condition that it is to be delivered to the purchaser, on its being signed by the younger brother, and the purchase-money received. The younger brother objecting to sign, the purchaser still insists upon the benefit of the contract, as entered into by the elder, and sues accordingly.—Is he entitled to it?

Answer.

It depends on the age of the younger brother at the time. If he was of age, the claim is available only as against the share of the elder, who took upon himself to enter into the contract without the privity of his brother. But if the younger were at the time a minor, the property being undivided, the purchaser may enforce his claim to the full extent.

(Signed) VISTNU PANDOORUNG, *Sastree.*

Remark.

This opinion seems to be grounded on the Mitacshara on Inh. ch. i. sect. i. § 29; but should be restricted, as it there is, to a case of indispensable necessity for the common interest. The purchaser must take care, that the purpose of the sale be such as will maintain its validity under the provisions of the law. C.

ZILLA OF CHINGLEPUT.

June 18, 1805.

(Ante, vol. i. p. 201. 202.)

Upon an application to the Court on the part of Vizayaragavienjar, son of Vurdienjar, for a division of family property belonging in coparcenary to himself and uncles, it appears that the complainant, having taken upon himself to dispose of a village belonging to the property in question, has appropriated the proceeds partly in the discharge of his father's debts, the remainder to other purposes foreign to the coheirs.

Answer.

Upon this statement, Vizayaragavienjar had no right to dispose of any part of the joint property, to answer either the debt of his father, or any purpose of his own, without the consent of his coparceners, no partition having been previously made.

(Signed) KISTNAMA CHARIAR, *Pundit.*

Remarks.

See Mit. on Inh. ch. i. sect. i. § 30. 32. None can dispose of joint property (especially immoveables) without consent of the sharers. But here the sale appears to have been without authority, general or special. In setting it aside on this ground, equity would require redress to be afforded to the purchaser, by enforcing a

partition of the whole, or a sufficient portion of it, so as to make amends to the purchaser out of the vender's share. It is presumed that the debt, stated to have been discharged, was one for which the coheirs were no way answerable; else the case would come within the exception in the Mitacshara, ch. i. sect. i. § 28. C.

"Had no right," &c. Certainly not. And the sale is valid, only so far as the seller's share in the property extended. Both the seller and purchaser are punishable criminally in this case; for the sale is fraudulent in one; and, subject to the contrary being shewn, the law will imply that it is collusive in the other. See the title of *Aswamivicraya*, sale without ownership in any of the books. E.

ZILLA OF CHITTORE.

(Ante, vol. i, p. 206.)

The deceased, possessed of property according to the accompanying schedule, left at his death two wives, with one son by the first, and three sons and two daughters by the second. How, according to Sastra, is the estate to be divided?

Answer.

There is *Patni bhaga*, and there is a *Putra bhaga;* and it is a question much disputed in books, which is the true rule of division. *Patni bhaga* is the division according to wives; *Putra bhaga* that according to sons. With some, as in the *Sarasvati Velasum*, it depends upon caste; *Basheacarloo* being said to have settled it, on comparing all the authorities, that, in the Brahmin caste, *Patni bhaga* should prevail, the widows taking equal shares with their respective sons; that, in the *Chatrya* they should have only what their husbands pleased to give them; and that, in the Vaisya, and Soodra castes also *Patni bhaga* should be the rule, grounded with respect to these, on custom. The parties in this case being Soodras, custom governs, not law, excepting so far as custom becomes law, in the extent to which it prevails, as it does in this case, superseding the Sastras; and the division accordingly must be according to *Patni bhaga*.

(Signed) ALAGA SINGANA CHARY.

Remarks.

If the custom be as stated, the opinion is right. But the general doctrine is, that partition by allotment to wives, instead of their sons, only takes place when the number of sons by each wife is equal. See 2 Dig. p. 572, 575. texts lix. lxii. C.

"A question much disputed in books, which is the true rule." I know not that any authority admits *Patni bhaga* to be the "true rule." It is only allowed by some, and entirely rejected by others; this is all the "dispute" that exists about it.

Supposing (what does not appear) that the customary existence of *Patni bhaga* was proved to obtain in the particular, *Cula* of Sudras, to which the parties in the cause belonged, this opinion is correct; if not, not. The division by *Patni bhaga* must always be unequal with respect to the children of each *Venter;* for if there be two wives, and one son by either first or second of the two, he takes half the estate; and if there be a dozen by the other, they take no more among them. In the present case, dividing by *Putra bhaga*, the three sons would take each one-third of the estate, and the mothers and sisters would be jointly provided for: if by *Patni bhaga*, the son of the first marriage takes one-half, and provides for his own mother only, those of the second take one-half also, and provide jointly for their mother and sisters. If the order had happened to have been reversed, and the single son been of the second marriage, he, though the younger

brother of the four, would still have got half of the whole estate. These are the different effects of the two modes of division, which I have taken this opportunity of explaining; an explanation which, I think, clearly shews that no judge should allow of the division by *Patni bhaga*, if he can avoid it. E.

ZILLA OF CHINGLEPUT.

Jan. 29, 1807.

(Ante, vol. i. p. 206.)

The parties are of the Sudra caste, and the deceased having died leaving two widows, with one son by one, and three, with two daughters, by the other.—How is the estate he has left to be divided?

Answer.

Any *boná fide* gift by the deceased in his lifetime, the jewels given to the girls, those worn by the wives, together with their clothes, the jewels worn by the sons, or their wives, being equal in value, and if not equal, enough being set apart to render them so; deducting all this, with as much as may be sufficient to provide for the weddings of the unmarried brothers and sisters, the remainder should be divided equally among the mothers and sons. It is true, that some, among the Sudras, first divide according to the number of widows, or mothers, and then subdivide the respective shares among the sons of each. A rule to this effect is laid down in the *Sarasvati Vilasa*, sect. *Dayabhaga;* but not being founded on the Sastras, it is not to be followed.

Remarks.

With respect to the deductions to be previously made, see Mitacsh. on Inh. ch. i. sect. iv. 16. Dayabhaga, ch. vi. sect. ii. p. 127. and Jagannatha, book v. under

ccclxii. and cccclxxiv. With respect to the rule of division alluded to, considering the difference of opinion which appears to prevail, it would seem not to be a well established usage, to divide the property among wives, instead of sons. C.

The division of heritable property among the whole offspring, and not among the widows, (for example, if there are seven children and three widows, the division of the estate into seven shares, one for each child, instead of into three; *i. e.* one for each widow and her respective children,) is the law of the Sastras; the contrary, however, is established in practice in many parts of these territories, as fully as is *Gavelkind* in Kent; and is therefore properly admitted as legal, in the *Saraswati Vilasa.* E.

Note. The question involved in this doubt is as between *Putna Baugum,* and *Putra Baugum.* The former is, where the division refers to the mothers, and is *per stirpes;* the latter, where it is *per capita,* directly among the sons. And it seems to be *vexata quæstio.* Some, where there are several widows, contend for the right of each mother to share equally with her sons; but these are but few. Whatever be the rule, as it regards the sons, the widow, or widows, are to be provided for out of what has been left by the deceased, in the shape of maintenance.

The custom alluded to by the Pundit, is certainly contrary to the general law; as to its local prevalence, I of course cannot speak. In this case, the sons are the heirs of their father's estate; out of which they are bound to

provide for his widows, and the marriage of their sisters. In the Mitacshara, it is held that each widow should receive as maintenance a son's share; and that each unmarried daughter is entitled to a quarter of what her allotment would be were she male. According to this doctrine, supposing the two daughters unmarried, I imagine the estate would be divided into thirty-two parts, of which each son would take five, each widow as maintenance five, and each daughter one. S.

MADRAS.

Sudder Adawlut.

Aug. 9, 1808.

(Ante, vol. i. p. 206.)

A Hindoo, possessed of landed and other property, dies, having had two wives, by one of whom he leaves two sons, by the other only one. The sons disagreeing as to the division of the paternal property, it is required to know how it is to be made.

Answer.

In Jagannatha, (division of inheritable property,) it is directed that the estate, real and personal, left by the father, should be equally divided among all his sons.

(Signed) VENCATASA, *Sastree.*

Remark.

See Digest, vol. iii. p. 75. book v. 52.

This is the law; but in many parts of the Southern countries, the custom of dividing the property in equal shares to the *venter*, and afterwards equally between the sons of the several *venters* is so strongly established, that it must be allowed to supersede the general law. E.

Vid. post, p. 424.

CHITTOOR, PROVINCIAL COURT.

March 18, 1811.

(Ante, vol. i. p. 206.)

The deceased, a member of an undivided family, died, leaving three brothers undivided, and a son of about eight years, under charge of one of his uncles. The son, having come of age, calls upon his guardian uncle to account for his father's share of the property, which the uncle refuses to do, alleging that he (his nephew) is entitled only to share in common with his uncles and cousins. The estate remains undivided. What is the law?

Answer.

If the brothers of the deceased, and other kinsmen who are entitled to share the common property, have lived together in one house, dressing victuals together, and performing religious rites and duties in common, and eventually augmenting their means, whether by their joint industry, or by employment of the family stock,—in such case, after first discharging any debts that may be owing, what remains of the property of every description, viz. the live stock, precious metals, houses, lands, &c. is divisible equally. Brother's sons take respectively their father's shares. The claimant is entitled to the share that would have belonged to his father.

(Signed)

Remark.

The right of the nephew, to receive his father's share from his uncle, is explicitly declared in a passage of Catyayana; (cited in 3 Dig. p. 7. text lxxix.) and the power of any one of the coheirs to exact partition of the joint property may be gathered from the Mitacshara, and is distinctly affirmed by Jimuta Vahana, ch. iii. sect. i. § 16. C.

ZILLA OF DARAPOORAM.

Dec. 22, 1807.

Coopanyengar and Romanyengar,

v.

Appanyengar and Terumalyengar.

(Ante, vol. i. p. 206.)

The parties are brothers; of whom the Defendants are the two elder. Of the Plaintiffs, one is eighteen, the other only fifteen years of age. Their mother is living. The suit is for a partition.—Is it competent?

Answer.

Where any of the coheirs are at the time infants, their elder brother should maintain them, till they come of age, when they may demand their shares. The Plaintiff in the present case, who is only fifteen, cannot support a complaint against his elder brother.

(Signed) SANKARA, *Sastree.*

Remark.

The sovereign, or his representative, as guardian of the minor, is competent to authorize a partition;—and an application to him, for his authority for the purpose, might constitute a suit. Nothing has been found in the law to prohibit the demand of a partition for the benefit of a minor.—3 Dig. p. 544. text ccccliii. 2. C.

ZILLA OF SALEM.

April 14, 1808.

Moota Butten,

v.

Linga B—, Kistnan, Vencatachellum, and Coopen.

(Ante, vol. i. p. 188. 206.)

The Plaintiff and Defendants being cousins, the former brought his suit for his share of the common property, descended and acquired: alleging that they had all lived together in one house as a united family till 1806, when, upon disputes arising among them, he had been turned out. On reference of the evidence in the cause to the Pundit of the Court, he reported as follows:

Report of the Pundit.

Upon consideration of the complaint of the Plaintiff, stating that his deceased father, and the father of the Defendants, were brothers; that he and the Defendants lived together till the 12th of *Audy* of the year *Atchin*, (1806,) in one house, as one common family;—that, subsequently, disputes arising between him and the Defendants, they turned him out of the house, and that they are accountable to him for his fifth share of the patrimonial estate, and of their own acquirements in addition; as well as of a house consisting of five compartments; also of the answer of Linga Butten, the first-named Defendant, (the others having admitted the claim,) alleging that the estate was formerly divided on the 23d of the month of *Aury*, of the year *Viscanasoo*, (1785,) in presence of their rela-

tions, by releases, putting an end to all future disputes and claims:—that afterwards, in the year *Nala*, (1796,) a dispute arising again, it was again settled; together with the declarations of some of the witnesses of either party, stating that it was true that formerly (the chests, bonds, and accounts excepted) the rest of the estate had been divided in five shares;—and of others, that when the division took place, the Plaintiff, being then an infant, his share was taken possession of, one half by Linga Butten, and the other by the other Defendants; adverting likewise to the release and documents delivered in by Linga Butten, in proof of the division:—It not appearing that the Plaintiff ever recognised the release relied upon by the Defendant Linga Butten, and there being no evidence that he has in fact ever received his share; added to which, two of his cousins (Defendants) admit his claim: according to Menu, Vijnyaneswara, &c. (Hindu Sastras,) the Defendants ought now to proceed to a division of the property in their possession, and give the Plaintiff his share, according to his claim.

(Signed)

Remark.

It does not appear that the original partition would have been void, if the due allotment for the minor had been securely set apart, with the approbation of his guardian, or of the representative of the sovereign. In the case, as set forth, the share stated to have been set apart for the minor, in the hands of the Defendants, was never delivered to him by them; nor had the partition been ratified for him by his guardian. C.

ZILLA OF BELLARI.

January 25, 1808.

(Ante, vol. i. p. 209.)

The parties, in this case, form an undivided family; of whom one, being the conicopily of a village, receives the *Mara Vurtanah*, *Bazar Vurtanah*, and other dues.—Is he accountable for them to his coparceners, notwithstanding he alone discharges the whole duty?

Answer.

It being declared that brothers undivided must, without reservation, equally share all the cattle and household goods left by their father, and the *Mara Vurtanah* being considered the same as household property; it follows that the perquisites in question are divisible.

(Signed) RUNGACHARY, *Pundit.*

Remarks.

If the office be hereditary in the family, the dues or profits appertaining to it must be subject to be shared. But in such case it classes with immoveables; and corodies, and the dues belonging to it, cannot be reckoned household property. C.

I doubt whether the *Mara Vurtanah*, &c. perquisites of office, granted for the performance of specific duties, can be "accounted the same as household property." On the contrary, it appears to me, that they cannot so be ac-

counted. For what is the real nature of them? Are they not given for the subsistence of the officer, enabling him to apply his whole time and attention to the accounts of the village; and would not the division of them among a number, for whose maintenance they cannot adequately provide, destroy their object? Again, does not the law that regards the grant of a corody apply to these and similar perquisites? and has not the grantor, or he who pays, a right to see that they are appropriated according to the original intention under which they are granted? I have no doubt but it applies, and that similar official perquisites, though certainly heritable, are not divisible; nor ought they to descend by primogeniture. The most capable of the direct, or in their default, of the collateral descendants of the first grantee, should be selected for the performance of the duties of the office, who should enjoy the whole perquisites. E.

See the next case.

ZILLA OF CHINGLEPUT.

Jan. 24, 1804.

(Ante, vol. i. p. 209.)

There being several brothers, constituting an undivided family, Government, in consideration of the personal services of one of them in particular, granted him a village in *Srotriyam*,(1) to be held by him and his posterity, with a restriction not to sell, alien, or otherwise dispose of it. The grantee being dead, leaving sons and daughters, a dispute concerning it has arisen between the eldest son and his uncles; and the question is, to whom it now belongs, whether to the lineal representatives of the deceased exclusively, or to them only in common with their uncles?

Answer.

The first and other sons are to enjoy the property in question, equally, defraying, out of what they have, the necessary expenses of the family, and getting the daughters married. Property acquired by the deceased and his brothers, through their joint industry, or the use of their patrimony, which was in common, the latter are interested in, together with the sons of the deceased. For his separate acquisitions, they vest exclusively in his descendants.

(Signed) T. KISTNAMACHARY, *Pundit.*

(1) From *Srotriyas*, learned teachers of the Vedas, 2 Dig. 290;—to whom, being Brahmins, belonged, not only the priesthood, but the office of judge also; (as with us formerly, *nullus clericus, nisi causidicus*;) and to whom, on these accounts, such grants were usually made. See vol. i. of this work, p. 310.

Remarks.

See Mitacshara, ch. i. sect. iv. 10. 31. C.

A *Srotriyum*, granted for public services, is an honourable reward to the individual, and an inducement to others to act as he has done. The honour and inducement are both lost, by its becoming the same as ancestral property, and being subject to endless division.(1)

Of divisible property the daughters would be entitled to a share, on division taking place before their marriage; but it does not appear that they can demand a division.

E.

The brother of the deceased Shotriumdar can have no claim upon any grounds. It was not ancestral property, but given by the Government as a reward for services to the individual. The Government never would have granted it, if they had thought an idle brother could have claimed a share. T.(2)

I am inclined to concur in the general accuracy of the Pundit's opinion; nor can I find any thing inconsistent with the grant, that the estate should be enjoyed by the heirs of the grantee, according to their legal interests. Any practical inconvenience, which in the course of time

(1) It would seem from this to have been Mr. Ellis's opinion, that the grant, on the death of the grantee, should ensue, not to his heirs generally, but to a select one, according to the notion expressed by him, in his remark on the preceding Appendix, ante, p. 364;—upon which see Mr. Sutherland's, next page.

(2) William Thackeray, Esq. deceased, late Member of Council at Madras.

might be experienced, would be ascribable, not to the law, but to the want of explicitness in the grant. In the present case, the estate having been acquired by the exclusive exertions of the grantee, his brothers have clearly no right to participate in it. As to the interest of the unmarried daughters, doubt certainly presents itself. I cannot but regard as more correct, more consistent with the genius of the Hindu law, the opinions of those writers, who merely admit the right of unmarried daughters, to receive from their deceased father's estate, what may be sufficient to provide for their marriage. Texts, however, of Menu, and Yajnyawalcya are adduced, which mention the fourth part of a brother's share as the unmarried sister's allotment; and Vijnyaneswara, in the Mitacshara, denies that the mention of a quarter of a share can be construed as used indefinitely, and as merely intending, that a sufficiency to provide for the daughter's marriage should be given. This author accordingly contends, that after the decease of the father, the unmarried daughter participates in the inheritance, receiving one-fourth of what would be her share, were she male. S.

ZILLA OF CHINGLEPUT.

Dec. 17, 1803.

(Ante, vol. i. p. 151. 210.)

The Plaintiff complains that the Defendants have usurped his turn of *Teertam* and *Prasadum*,(1) in the temple of *Vardaraja Swamy*. It appears that the grandfather of the Plaintiff was one *Sachen;* and that the grandfather of one of the Defendants, and the great-grandfather of the other two, were brother and uncle to *Sachen*. It further appears, from written evidence, proved by the *Teertacarars*(2) of the Pagoda, that the Plaintiff has been in the profession and enjoyment of the right.—Is his action maintainable?

Answer.

It appearing that the Plaintiff and Defendants are cousins, not exceeding four degrees of descent, and that the Plaintiff has been in possession of the right he claims, he is entitled to it; but it should be enjoyed by him, with reference to the proportions of the respective ancestors of the parties.

(Signed) TREMALY KISTNAMACHARY.

(1) *Teertam*, holy water; either of some sacred spring, or a mixture of liquids, in which the sacred images have been washed. *Prasadum*, holy food, prepared in the Pagoda, for the consumption alone of holy men.

(2) *Teertacarar*, holy men, entitled to partake of *Prasadum*.

Remark.

The hereditary privileges of the family, with the income arising from them, are divisible among heirs, like other patrimony, under the general rules of inheritance. At most of the religious establishments of the Hindus, and at their great temples, the various offices attached to them are considered as hereditary, together with the perquisites belonging to them. C.

CHITTOOR, PROVINCIAL COURT.

August 2, 1811.

(Ante, vol. i. p. 211.)

Upon a question as to the division of the jewels of the family, on a partition being about to take place;—it being stated that some of the individuals were in possession of a larger quantity than the rest, the Pandit, on reference to him, reported as follows:

As to the jewels, each female is entitled to retain whatever she was in the habit of wearing in her husband's time, or were given to her by way of dowry, (*Stridhana*,) whether by parents, brothers, uncles, or husband. Beyond these, *i. e.* with respect to what may have been made up out of the family stock, held in common, if there be no great difference among them in point of value, no account ought to be taken of the surplus. On the other hand, if the difference be considerable, *i. e.* if the value of the surplus jewels, possessed by some one or more of the women greatly exceed those possessed by the rest, the whole excess should be divided.

(Signed)

Remark.

Mit. on Inh. ch. i. sect. iv. § 19. and ch. ii. sect. xi. Also Jagannatha, 3 Dig. under texts ccclxii. ccccIxxiv.

C.

ZILLA OF CHINGLEPUT.

March 7, 1807.

(Ante, vol. i. p. 213.)

Vurdyengar, *v.* Alagasingyengar.

The parties, uncle and nephew, lived together in the same house as one family up to a certain time; when they separated, but without dividing. A division being now called for, the question is, whether it should embrace their subsequent gains?

Answer.

No division having as yet taken place, whatever has been acquired by the parties since they continued living together, is to be considered as a part of the common stock; and the division must be of all belonging to them at the time of dividing.

(Signed) KISTNAMA CHARIAR.

Remark.

The common stock, however improved and augmented, is to be equally divided; but, if separate acquisitions have been made, to which the patrimony was instrumental, the acquirer is rewarded with a double share. Separate gains of specified sorts, to effect which the patrimony was not used, would belong exclusively to the acquirer. Mitacshara, ch. i. sect. iv. § vi. 29. 31. In the present case, it is presumed there were no such acquisitions. C.

MADRAS.

Sudder Dewanny Adawlut.

(Ante, vol. i. p. 214.)

In an undivided Hindu family, by what means can one of the members acquire separate property, to the exclusion of his coparceners?

Answer.

He may do so, by carrying on cultivation, or by following any other pursuit, without using for the purpose the family estate. Property, so acquired, though by a member of an undivided family, belongs exclusively to the acquirer,—otherwise, if the paternal estate have been employed in the acquisition.

(Signed)

Remarks.

See Mitacsh. on Inh. ch. i. sect. iv. § 6. 10. 29.

C.

The answer leaves in the dark that which is most material to be known,—namely, what is the use of the paternal estate here intended by the law. With respect to the mere bodily labours of agriculture, they certainly may be carried on without such use, direct or implied. Many other occupations cannot be carried on, without at least an implied use. There exists considerable controversy

on the point in the books; and many minute distinctions and limitations are made as to what is use, and not use; so that it appears to me to be one of the many points left to the equity of the judge. Three rules are, I think, sufficient for his guidance. First, all property, inherited or acquired, is divisible. Secondly, the acquirer is entitled to an additional share of the property acquired. Thirdly, the judge must determine, on an equitable consideration of the circumstances of the case, whether the acquisitions of any of the individual parceners have been made without such use of the family property, as in law would render them divisible. E.

ZILLA OF SALEM.

May 17, 1808.

Seenewasa Chitty, *v.* Colletta Chitty.

(Ante, vol. i. p. 214. 220.)

The Plaintiff states, that he and the Defendant being brothers, and their father dying about four years ago, they lived together, till a dispute arising between them, and the Plaintiff in consequence demanding a partition, the Defendant, his elder brother, turned him out of the house. The petition of complaint states the patrimonial property, with the additions made to it since the death of the father, (consisting of ready money, fine gold, silver, house, &c.) as amounting to sixteen hundred pagodas, of which the Plaintiff demands a moiety, as his share.

The Defendant, denying the alleged amount of the property, said that their father died indebted six hundred pagodas a great many years ago, leaving him at the time only six years of age, and his brother, the Plaintiff, only three; that he, the Defendant, begging about, and getting his meals at different houses, acquired learning, and a knowledge of business, and, having thereby gained some money, discharged his father's debt, married, was at the expense of his brother's marriage, and, in 1794, presented the latter with ten pagodas to set him up; that he, the Defendant, singly provided the necessary disbursements, and performed the ceremonies at the death of their mother; and that, from any acquisition made by the Plaintiff, he never had received a single cash.

It appears that the house referred to, having descended from the father, and being out of repair, was repaired by the Defendant; and that the quarrel alluded to originated with the Plaintiff; and the Defendant having upon the whole substantiated his case, while the Plaintiff has proved nothing, you are to say, to what extent the claim of the latter is to be maintained.

The Pundit, recapitulating the particulars, and commenting upon the respective allegations of the parties, as they stood supported, or otherwise, by evidence, gave it as his opinion, that the Plaintiff, instead of cordially adhering to his elder brother, who had supported him like a father, having quarrelled with, and thought proper to desert him,—and, with the exception of the house, it not appearing that there had existed any patrimony as the foundation and means of the Defendant's gains, or that he had ever received any thing from the Plaintiff,—the house and shop having been the property of the father, should be equally divided between them. That, beyond this, should the Defendant, out of brotherly affection, be disposed to give the Plaintiff any thing, it might be well; but that he had no right to insist on a partition, to the extent claimed.

(Signed) SINGANA CHARIAR.

Remarks.

The opinion, here delivered, is conformable with Vijnyaneswara's doctrine. See Mitacsh. on Inh. ch. i. sect. iv. § 10. C.

Under the circumstances of the case, as stated by the Judge to have been made out on the part of the Defendant, this opinion appears to be correct. The acquisitions of the elder brother were not in fact made by the use of the family property. The law will imply that they are so made; but when the contrary is shewn, they are not divisible. Had the Defendant been educated by the father, the case would have been different, for it must have been at the expense of the family, had it been so; and, in that case, *the acquisitions would by consequence have been family property.* E.

Qu. the position in Italics. . T. A. S.

CHITTOOR, PROVINCIAL COURT.

May 29, 1810.

To the Pundit, Alaga Singana Chariar.

(Ante, vol. i. p. 216. 218.)

You are hereby directed to take the following case into your consideration, and return your opinion, whether the three villages in dispute are to be considered as of the particular acquirement, and under what circumstances, of Babu Rajah, or as included in the patrimony.

The Case.

Calyana Rajah and Babu Rajah, represented respectively by the appellant and respondent, were descended from Rama Rajah, who, in his lifetime, was proprietor of two of the villages in dispute, namely, *Poodupakum*, and *Chatum Coopang*, possessing also the right of *Cauvel* in the districts of *Covelong*. About the time of his death, which is many years ago, one Virama Rajah, having joined the French during an engagement, took possession of these two villages, together with the privileges belonging to them. Calyana Rajah, and Babu Rajah having thus lost their patrimonial estate, they, in consequence, separated, and from that time till the death of Babu Rajah, (being a period of eighty years,) there ceased to be any intercourse between their respective descendants. Subsequent to the death of Calyana Rajah, thus separated, Babu Rajah having procured assistance from the Company, during Mr. Pigot's govern-

ment, subdued Virama Rajah, and recovered possession of the two villages, which had been formerly taken from the family. The third village, called *Ottyaporum*, he obtained as *Moohasa*, or free of rent, during the collectorship of Mr. Place. Under these circumstances, a share in them is now claimed by the descendant and representative of Calyana Rajah.

Answer.

If, during the time that Calyana Rajah and Babu Rajah were in possession of their patrimonial estate, it was seized by their enemy Virama Rajah, and subsequently recovered by Babu Rajah, without aid from the patrimony, he and Calyana having antecedently separated, the general conclusion would be, that it is Babu Rajah's, as of his particular acquirement. But, to be certain, it is necessary to know whether their separation took place with the intervention of relations and witnesses, with deeds of division; and further, whether the recovery subsequent by Babu Rajah was with the privity and acquiescence of the sons and grandsons of Calyana Rajah, or otherwise, and how. The acquiescence alluded to means a writing, purporting, "You will sub- "due back our patrimonial property, which was seized "and possessed by a stranger, and enjoy it yourself. I "shall expect no part of it." It is further necessary to know, with reference to a passage of Vyasa,(1) whether, in the re-conquest of the property in question, money, carriages, arms, or other things belonging to the patri-

(1) Cited by Jimuta Vahana, ch. VI. sect. i. § 14.

mony were used, and in what, if any degree; or whether the recovery were made exclusive of it. If, upon examination, it appears that Babu Rajah acted on occasion without the warrant or cession from the original coparceners, or their representatives, notwithstanding his merit, and continued enjoyment for a length of time, the property is still liable to division, more especially if obtained by means common to him and them; one-fourth being previously deducted, as his remuneration for the recovery. With respect to the village obtained during the collectorship of Mr. Place, the right to it, whether it is to be considered as sole, or joint, depends upon its having been acquired, or not, by the employment of the patrimonial property.

(Signed)

ALAGA SINGANA CHARIAR, *Pundit.*

Remarks.

The "acquiescence," spoken of by the Pundit, is required under the restriction stated in the Mitacshara, commenting on a passage of Yajnyawalcya. See Mit. on Inh. ch. i. sect. iv. § 2. Where no division has taken place, *i. e.* if the brethren were not separated in their interests and concerns, the patrimony which is recovered, is recovered to the use of all the heirs, allowing, however, a fourth, as remuneration to him who recovered it. See Sancha, cited in the Mitacsh. ch. i. sect. iv. § 3. C.

This is an excellent and very correct opinion of Alaga Singana's; but it may be convenient to explain the general law upon which it turns. If, at the time an estate is

divided, any part of the assets belonging to it, in whatever shape they may exist, be not forthcoming, so as to enable an actual division of them to be made, either the parceners must come to some mutual agreement regarding them, prospectively to their recovery, or the right to such property will continue to rest in them jointly, their heirs and representatives, in the same manner as if no division had ever taken place. Hence the Pundit properly says, "it is necessary to know whether the separation "took place with the intervention of relations and wit- "nesses, with deeds of division," &c. It is necessary to know in fact the exact terms and agreements, under which Calyana and Babu Rajah separated; for, in this case, it is not sufficient to prove the mere fact of separation; it must be seen, whether any specification was made at the time, respecting the villages removed by the act of Virama Rajah, from the possibility of actual division. If it were said at the time, "whoever recovers the family property, "let him keep it," the question is at rest. If it was not so said, then Babu Rajah must be taken to have been acting for the joint interest, in the recovery he effected; the property so recovered, notwithstanding the division, remained joint property, being a portion of the assets that was never divided. In this view, he cannot be allowed to appropriate it to his own use; the villages retain their original character of joint family property, and are divisible among the surviving representatives of Rama Rajah, the common ancestor. As to the right of the representatives of Calyana Rajah, to cede their claim to Babu Rajah, if they chose to do so; and to that of Babu

Rajah (by the same rule that applies to the actual *acquirer* of property) to an addition to his share, under certain circumstances; with his sole right to the third village, obtained after separation from his brother;—these require but one remark; it is, that, if it can be shewn that he recovered the family property first, and used it to acquire the third village, this also becomes divisible, reserving to Babu Rajah his claim to a superior share. E.

ZILLA OF BELLARI.

December 22, 1807.

Tommee Reddy and Chenehoo Reddy,

v.

Narasimma Reddy and Bandy Reddy.

(Ante, vol. i. p. 193. 208. 220.)

The parties, of the Sudra caste, are four brothers, comprising an undivided family, desirous of dividing. They have a mother living, and a sister; the latter married, and provided for. Proprietors of a village, the eldest managed the domestic affairs; the second those of the village, improving and augmenting the property. How is it to be divided?

Answer.

The sons should give a share to the mother; and a twentieth part should be deducted for him who has had the most to do with the ceremonies, and has added to the property. The remainder should be equally divided among them. The mother's share will descend to the daughter.

(Signed)

RANGACHARY.

Remarks.

The practice of allotting a twentieth part to an elder brother, besides his share, is obsolete; as is declared in

clear explicit terms in the Mitacshara, ch. i. sect. iii. § 4. And it is affirmed, that, if the common stock be improved by one of the joint sharers, an equal partition nevertheless takes place. Ibid. sect. iv. § 31. If one of them, however, had made any separate acquisition, his proper remuneration would be a double share of that particular acquisition; not a twentieth part of the whole.

The allotment of a share to the mother, at a partition among brothers, is directed by the Mitacshara, ch. i. sect. vii. § 2. The subject is more fully treated in the Chandrica, where it is shewn that her allotment, including what she already possesses, as separate property, is to be made equal to a brother's share. But the Smriti Chandrica, on one hand, and the Mitacshara and Madhavya Acharya on the other, differ on the question, whether it be an absolute assignment of a share, or merely a setting apart of a portion for her maintenance. See Mitacsh. on Inh. ch. ii. sect. i. § 32.

Daughters succeed to their mother's property, after payments of her debts. Mitacsh. on Inh. ch. i. sect. iii. § 9. C.

The allowance of an addition to the active representative of the family, and the descent of the mother's share on the daughter, rest on authority; they are doubtful, however, the latter especially, as the daughter is married. This, however, has nothing to do with the present case. With respect to the division among the brothers, the better mode is, first, to divide the property

descended from the ancestors into equal shares; secondly, to divide what has been acquired by the possessors into unequal ones, giving a larger share to the acquirer; leaving the proportion to the common consent of the coparceners; or, in case of dispute, to the equitable discretion of the Judge; the law, though it mentions a specific proportion, intending it as an example, not as a precept. The Pundits in general do not understand this. E.

The best authorities regard the old law, respecting an unequal division amongst sons, as not applicable to the present age. S.

ZILLA OF CHINGLEPUT.

May 5, 1809.

(Ante, vol. i. p. 222.)

Two brothers in the Canara Chitty caste lived together, as one family, possessed of several houses, lands, stock in trade, and outstanding balances. The younger, apprehensive that the elder was wasting the property, and thinking that, if he did not divide on the proposal of the elder, he might be a sufferer, a division took place, and he received his share.—Is a division, under such circumstances, valid?

Answer.

As the brothers appear to have divided freely, the division is good.

According to various passages in different authorities, treating of the division of property, there appear to be three distinct modes. 1. That of *Pracasa Vebhaga*, or public division, where it is made in the presence of the relations of the parties. 2. *Rahasya Vebhaga*, or private division, where a few only are present, as mediators. 3. The *Anyanya Vebhaga*, where it is by the mutual consent of the parties, not made known to any other.

(Signed) ALAGA SINGANA CHARIAR,
Pundit of the Provincial Court.

Remarks.

This opinion is correct. The difference between the second and third modes is, that, at the *Anyanya Vebhaga*, (literally, division without a stranger,) none but the parceners are present when the estate is divided; and that, at the *Rahasya Vebhaga*, (private division,) a few friends and mediators only are present, and the circumstance is not generally published to the world. E.

ZILLA OF VIZAGAPATAM.

April 30, 1808.

(Ante, vol. i. p. 227. 233.)

Three brothers, deceased, carried on their concerns in their lifetime separately, in different villages, for between thirty and forty years. No releases appear among them, nor is there any written proof that they ever divided.—Are they to be considered as having divided; or is it competent for their respective representatives, or any of them, now to call for a division?

2. Supposing them to have left only one son, with widows, to whom does their property belong?

Answer.

If there be suitable evidence, or visible marks applicable to a divided estate, it is not necessary that there should be a deed of division in writing. If sons, grandsons, or kinsmen have lived long separate, carrying on traffic, and other worldly concerns, without aid from the common stock, performing also religious ceremonies separately, there will be no ground for a division of such existing separate estates.

Of the property in question, any that remained undivided vests in the surviving son, to the exclusion of the widows.

(Signed) D. Narrayana, *Sastraloo.*

Remarks.

The answer to the first question is correct. Mit. on Inh. ch. ii. sect. 12. ch. i. sect. 9.

(Ante, vol. i. p. 233.)

On the second question, a difference of opinion exists, whether an undivided residue shall be subject to rules of succession relative to separated, or unseparated brethren. Authorities are cited on both sides; but the opinion here given seems the best. C.

ZILLA OF VERDACHELLUM.

February 27, 1807.

Mootoosamy, *v.* Pachiapilla.

(Ante, vol. i. p. 222.)

When the elder and younger brothers divide the estate, in whose presence, according to Sastra, should it be done? How many mediators ought there to be present? And what is the proper purport of the instrument of discharge?

Answer.

1. When a partition is to take place, the parties may, by consent, make it privately among themselves; or otherwise by the intervention of relations or neighbours; of whom the number may be seven, five, or three.

2. As to the form and contents of the instrument, it should recite the nature of the property, according as it is descended or acquired; and, in the latter case, the particulars of its acquisition should be stated. The respective sharers should be mentioned, and the articles allotted to each, specified. The name of the person to whom the instrument is given should come first. Then that of him by whom it is drawn, describing his father. The like description should accompany the signature of the parties, and the attestation of the witnesses. The year, month, and day, must appear. Thus should writings be reciprocally interchanged.

(Signed) SREENEVASA CHARLOO, *Pundit.*

Remarks.

1. This seems to be grounded on the passage of Vrihaspati, "Wherever seven, or five, or even three "Brahmins, versed in sacred and profane literature, and "acquainted with the law sit together, that assembly, "is similar to a meeting for a solemn sacrifice," or some like passage of another author.

2. See Vrihaspati, and the comment of Jagannatha on his text. 3 Dig. 408. C.

A proper description of a *Vibhaga patrica*, a deed of division among coparceners. E.

ZILLA OF VERDACHELLUM.

November 30, 1807.

(Ante, vol. i. p. 195. 227, 228.)

Jenintum Ammah, *v.* Chooliapadiatchy.

The parties are Soodras of the *Pullee* tribe. The Plaintiff's husband and the Defendant, being brothers, three years before the death of the former, divided their property, with the exception of a cat, a pillow, a carpet, and a writing-case; and, from that time, till the death of the former, lived separate, but still performing jointly *Pungall*, and the annual ceremony for their father. The Plaintiff's husband leaving no son, the Defendant performed his funeral obsequies: but under a protest, on the part of the Plaintiff.—*Qu.* Which is entitled to succeed to the property of the deceased?

Answer.

The Plaintiff's husband and the Defendant having continued to perform *Pungall* and *Tithy* jointly, the conclusion is, that no division ever took place between them; and the estate consequently of the deceased survives to the Defendant.

(Signed) SREENEVASA CHARLOO.

Remarks.

This would be a valid conclusion in a doubtful case. *Nareda* says, " When partition has been made, religious

" duties become separate." Mit. on Inh. ch. ii. sect. xii. § 3. The separate performance of religious duties is accordingly evidence of partition; and, conversely, the joint performance of them affords a presumption of family partnership in a doubtful case. Mit. on Inh. ch. ii. sect. xii. But, it appears from the statement made to the law officer, that, in this case, there was evidence of an actual partition; and the cause turned on a question of fact, which the Pundit assumes, from the circumstance above mentioned, against the evidence, to which the Court appears to have given credit. Joint performance of obsequies is not conclusive evidence of family partnership, against other and satisfactory proof of separation. As to the circumstance of a few articles remaining undivided, it would be no impeachment of a partition otherwise valid.

C.

Against a positive fact, of what force can be a mere conclusion?—If the act of division did indeed take place, the joint performance of the ceremonies after, (which might proceed from brotherly affection,) could make no alteration; and, as it appears from the case, as stated, that the fact of division was in proof, it does not make any difference in its effect. Had the division been doubtful, then certainly the joint performance of the ceremonies would be a conclusion against it; a conclusion merely, however; or, as it has been appositely called in another case, a " token," (*adyuharana*, I suppose, in the original,) not a proof.

E.

ZILLA OF CUDDAPAH.

July 9, 1807.

Veeranah, *v.* Vencatapah.

(Ante, vol. i. p. 224. 227.)

The parties are cousins, descended from brothers; the Plaintiff being the son of one Taulerajoo, the Defendant of Soobiah. The latter has three brothers. It is proved that Taulerajoo and Soobiah, in their lifetime, performed jointly their father's *Sraadums*, or ceremonies; and there is no evidence of a division of property having taken place between them.—Supposing the family to be liable to be considered as hitherto undivided, it is contended on the part of the Plaintiff, that the Defendant should account to him for the larger share, which he says he has enjoyed of the *Meerassy*, since the commencement of the suit.

Answer of the Sastraloo.

1. Joint performance of ceremonies implies union of interests; and it must be concluded that Taulerajoo and Soobiah lived and died undivided. It does not appear that the parties have divided since. No deed of division is stated. According to the accompanying extracts from Yajnyawalcya and Vrihaspati, if there are brothers, and they die, one leaving one son, a second two, and a third three; on a partition, the sons take respectively the shares of their fathers; *i. e.* the property being divided

into three equal parts, the son of the first takes one, the two sons of the second another, and the three of the third the remaining one. The estate in question, therefore, being divided by two, the Plaintiff being the only son of one brother, will be entitled to one moiety; the other will be the portion of the Defendant and his brothers, the four sons of the other.

2. From the moment of partition, each party enjoys his appropriate share. Parceners are not liable to account to one another for the degrees of enjoyment of the common property, pending the suit, where the magistrate has been appealed to for a decision.

(Signed)

Remarks.

1. This is rightly presumed, there being no evidence of a division. Mit. on Inh. ch. ii. sect. xii.—For the rule as to representation on a partition, see Id. ch. i. sect. v. § 2.

2. If the enjoyment have been disproportionate, they may be liable to account. See 3 Dig. 392. C.

ZILLA OF VERDACHELLUM.

April 19, 1808.

Ruman, *v.* Vadamaly.

(Ante, vol. i. p. 227.)

The parties, being cousins, have lived separate from one another these thirty years; and their respective fathers lived so before them for twenty. This appears; nor is there any evidence of a time when a union of interest between them existed. On the other hand, no deed of release is produced; nor any witness to prove the fact of division. Under these circumstances, a demand is now made for one. Are they to be considered as divided, or undivided?

Answer.

A separation for fifty years appearing, it must be taken that there has been a partition.

(Signed)

SREENEVASA CHARIAR, *Pundit.*

Remarks.

Catyayana, cited in the Smriti Chandrica, declares that partition of patrimony shall be presumed, where brethren have lived ten years apart, separated in their religious rites and civil observances. The Commentary holds this limitation to be analogous to that of ten years in the case

of moveables, and twenty in that of immoveables, adversely possessed. According to the general law, not the lapse of time, but acts indicating separation of interests, are evidence of partition. Mit. on Inh. ch. ii. sect. xii. 3 Dig. p. 407. C.

(Ante, vol. i. p. 188. 206. 233.)

Through four generations in view, and seven not in view;—through seven generations continues the right of partition. This is the general law. E.

ZILLA OF VERDACHELLUM.

April 13, 1808.

Arnachella Chitty, *v.* Namasevoy Chitty.

(Ante, vol. i. p. 227.)

If, in default of instrument of discharge, and witnesses to the fact, it be doubtful whether partition have taken place; from what circumstances may it be inferred?

Answer.

If the parties have been in the habit of spending, or borrowing money, without each other's consent;—if they have carried on cultivation separately; or borne separately their respective victualling expenses; if they have done things, whether the others liked it or not; from such tokens partition may be inferred. It may, in like manner be presumed, from their occupying separate houses and lands; from their making separate gifts and charities during holy days; from their dressing their victuals separately in one and the same house, and worshipping separately the Deity, and Brahmins; or from their becoming witnesses, or securities, &c. one for another; or if one appears to have made a gift to another, or a loan, taking an obligation to repay, or a sale; or if they have kept kine separately; or if they make separate offerings to *Varalatchamee*(1) poojah, &c. All such doings are evidence of partition having taken place.

(Signed) SREENEVASA CHARLOO.

(1) "*Vara Latchemee*"—worship performed by married women to the goddess *Latchemee*, one of the wives of *Vishnu*.

Remarks.

See Mit. on Inh. ch. iii. sect. xii. Also Jimuta Vahana ch. xiv. and 3 Dig. 407. C.

The judge is not bound, however, to take any, or all of these "tokens" as proof of the fact; he will determine it from a consideration of these and other circumstances, giving such weight to them as in equity they appear to deserve; this being one of the many points reserved by the Hindu law for equitable judgment. E.

APPENDIX TO CHAP. X.

ON WIDOWHOOD.

BOMBAY.

Court of Adawlut, at Broach.

April 4, 1810.

(Ante, vol. i. p. 243.)

On the death of a man belonging to a caste, in which *Natras* are permitted, if the age of his widow exceed not fifteen years, her parents possess the right of making the *Natra*. If she be more than fifteen, she is independent in this respect, and not under their control; but their consent ought nevertheless to be obtained. The husband must have been dead a year, before the *Natra* can take place. Should it be made within the year, the woman must not wear matrimonial ornaments, nor go to her new husband's house, till the expiration of this period. Gandharva Vivaha, or *Natras*, are permitted in the Mitacshara.

(Signed) Nurbhuyaram, *Sastree*.
Walubhram, *Sastree*.

Remark.

Gandharva marriages are briefly noticed in the Mitacshara, but no remarks have been found which identify them with *Natras*, or support the positions contained in this law opinion.(1) C.

(1) See Cases on this subject, in Bombay Rep. No. 14. p. 59.—and Id. Append. No. 4. p. 353.

BOMBAY.

Broach, Court of Recorder.

(Ante, vol. i. p. 37. 242, 243.)

On the death of a woman's *Vivaha Swami*, (first husband,) having neither son nor daughter, where it is allowed by the usage of her caste to marry again, the first marriage being called Vivaha, a subsequent one is termed *Gandharva Vivaha*, (1) and commonly called on this side of India, *Natra;* such second marriages being allowed only in the lowest castes, and in these with an exception of a son of her deceased husband by another woman, or of his nephew. Before a woman contracts one, she must restore the ornaments and apparel she received from her first husband to his heirs.

(Signed) NURBHUYARAM, *Sastree.*
WALUBHRAM, *Sastree.*

Remark.

Such second marriages are also practised among the lower tribes in Hindostan proper, and the East of India; and called in Hindostan, *Saghac.* Second marriages even of virgin widows being forbidden in the *Caliuga,* (See passages cited in the general note to the translation of Menu, i. and vi.) no such practice prevails among the superior castes. The refund directed by the Pundit is customary. C.

(1) See Menu, ch. III. v. 32.

ZILLA OF VIZAGAPATAM.

March 22, 1810.

(Ante, vol. i. p. 245.)

1. In the case of a widow, entitled to maintenance only, does it depend upon her remaining in the house of her deceased husband; or is she at liberty, without prejudice, to reside in her father's?

2. How is she to be provided for?

Answer.

A widow, residing occasionally with her parents, according to the custom of the country, should remain in general in the house of her husband, in which she is entitled to be provided with a suitable allowance. Either a yearly sum in ready money may be given her, or a portion of land that will yield one; or there may be a composition with her as can be agreed.

Remark.

She does not lose her right of maintenance by visiting her own relations; but a widow is not entirely her own mistress, being subject to the control of her husband's family, who might require her to return to live in her husband's house. C.

ZILLA OF VIZAGAPATAM.

(Ante, vol. i. p. 248.)

Questions.

1. May a widow, on the marriage of her daughter, make over her property to such daughter and her son-in-law?

2. May she assign to an elder sister, having a married daughter living?

3. Should both Sunnuds above alluded to, be liable to be considered void, which has the preferable right as heir to the widow, her daughter's husband, or her elder sister?

Answers.

1. Any thing that is hers, she has a right to transfer.

2. The daughter being nearer akin to her than the sister, she cannot assign to the latter, in exclusion of the former.

3. The daughter's husband.

(Signed) Dusky Narrain, *Sastraloo.*

Remarks.

1. No doubt the widow may give away her own property, excepting land given to her by her husband, or inherited from him; which she cannot dispose of, without consent of the next heirs.

2. This would amount to a restriction from giving, and is at variance with the answer to the preceding question. The approbation of her proper guardian may however be requisite.

3. The daughter's husband is heir, preferably to the sister; but would be postponed if the latter had a son; the sister's son being first heir after the husband, in the case of a woman's separate property.—See in Jagannatha, b. 5. v. ccccxiii; a passage which is cited in Smriti-Chandrica, Madhavya, and other compilations. C.

BOMBAY.

(Ante, vol. i. p. 248.)

Of two widows, the elder one has two sons by the deceased husband, the other a daughter. The latter having received her share of the deceased's property, and dying, in whom does her share vest; in her daughter, or in the sons of the surviving widow?

Answer.—Caret.

Remarks.

The share allotted as a provision to the widow (Mit. on Inh. ch. i. sect. vii. § 2.) does not pass to the heirs of her peculiar property (*Stridhana*), but to her husband's heirs. This point, however, may involve some difficulty, according to the opinion of those who hold, that it is a mere allotment for maintenance, not participation as heir. With regard to the daughter, she, as a sister, is entitled to the fourth of a brother's share, for her marriage. Mit. on Inh. ch. i. sect. vii. 6. C.

A reasonable doubt may exist, how the distribution of the property should be made in this case. It is certain, I think, that the law does not intend that the share of the widow should belong to her in absolute dominion; and it does not descend to hers, but to the husband's heirs. In this view of it, the sons of the surviving widow succeed to her share. But the daughter is the heir of the father, as well as the sons. And there is a strong text, fre

quently quoted and insisted upon by jurists, ordaining, that "sons shall succeed to the father, and daughters to "the mother." The difference exists, however, in the mode, rather than in the fact; for if she succeeds to the brother's share, she gets, in the present instance, a third; —if she takes by subduction from all the shares, a fourth.

E.

My idea is, that the portion of the husband's estate, to which the widow (with a daughter) succeeded, was still substantially the husband's estate, passing to his heirs, after the death of the widow, who had only a life interest in it.

D.[1]

I agree to this, and I think that, under the circumstances of the case, the two sons, according to the doctrine of the Mitacshara, which is most favourable to the claims of daughters, would be solely entitled to the property received as maintenance from their father's estate by the rival wife of their mother. According to the Mitacshara (at least so I understand it), on the death of the father, his estate would be divided into eighty parts; of which, in the course of inheritance, each of the sons would immediately take nineteen, and the unmarried daughter, to effect her marriage, four; being exactly one quarter of what would be her allotment were she male. The daughter's marriage being thus provided for, it appears to me that the portions of the two widows, on

(1) William Dorin, Esq. one of the Judges of the Sudder Dewanny Adawlut, of Bengal.

their respective deaths, would revert to the heirs at law of the husband, viz. his sons. It must be confessed this case presents difficulties, and I speak with much diffidence on the subject. S.

BROACH.

Court of Adawlut.

(Ante, vol. i. p. 247.)

The widow of a man of the goldsmith caste, having made a will, by which she disposed of her property to a stranger, to the prejudice of her daughter, who neither subscribed nor consented to it, it is void by the Dharma Sastra; and the person in whose favour it was, having been at the expense of her funeral, the amount should be reimbursed out of the estate, and the residue made over to the daughter.

By the Pundit.

Remarks.

A woman may dispose of her own peculiar property, (*Stridhana*,) but what comes to her from her husband, she can only give away with the sanction of his kin; with whom the control of her conduct rests. Without such sanction, even the consent of the daughter, as next presumptive heir, would hardly suffice.

It is equitable that the funeral expenses should be reimbursed. For the person who takes the succession is bound to defray the obsequies. 3. Dig. p. 545. C.

ZILLA OF VIZAGAPATAM.

November 19, 1805.

A. Ramasamy, *v.* Mandavilly Pariah.

(Ante, vol. i. p. 247.)

A childless widow having succeeded to the separate property of her husband, who has brothers living, to what extent has she power to aliene it, and how?

Answer.—Caret.

Remarks.

A widow who succeeds to her husband's estate, is restricted from aliening the *immoveables*, without consent of his heirs, according to the Madhavya; but there does not appear to be any restriction on her power, as affecting *moveables*. C.

The property of a widow in her husband's estate, is not absolute. *Na stri swa fantryar harite.* "No woman, "under any circumstances, is absolutely independent." A woman has a right to use the property to a certain extent in charity, though, no doubt, the Court would restrain *waste*, even on this account. E.

MASULIPATAM, PROVINCIAL COURT.

(Ante, vol. i. p. 247.)

Mahedara Ramiah and Cuvaly Veneanah, *Appellants;*
Oopudrasta Mallayah, - - - *Respondent.*

To the Pundit.

Atchana Dulchataloo, and Pandita Royaloo, were brothers by the same mother; and Pandita Royaloo having acquired some *agraharum* lands, divided them into eighteen portions, of which he gave twelve to Brahmins, reserving the remaining ones for his own use. Some time after he died, without male issue, and his wife ascended the funeral pile with him, having previously divided the portion reserved by her husband, as follows, viz.: one share to the Respondent Mallayah, the son of Atchana, the brother of her husband; one share to each of her husband's sister's sons, namely, Venkiah and Ramiah, the Appellants, and the remainder to Brahmins. It appears that Atchana and Pandita, the brothers, having divided the property previous to the death of Pandita, the wife of Pandita objected to the performance of her funeral obsequies by the Respondent Mallayah, on the ground (not proved) of his father having been degraded by his caste; and, at her desire, her husband's sister's sons, the Appellants, performed her funeral obsequies. You will state, for the information of the Court, how far the widow of Pandita had a right, by the Hindu law, so to dispose of the land left by her husband; or whether it becomes the property of his nephew, the Respondent?

Answer of the Pundit.

I am of opinion that the wife of Pandita Royaloo had sufficient authority to give away the land left by her husband, and that Mallayah, the Respondent, has no right to oppose the gift, his father not having objected, when Pandita divided away and distributed, at his pleasure, some parts, reserving to himself the residue of what he had acquired.

(Signed) V. NARSIMMA, *Sastree.*
May 13, 1805.

Remarks.

It is maintained in the Madhavya, that no widow can give away immoveable property, coming to her from her husband, without consent of the next heirs. This seems to be the correct doctrine. Pandita had doubtless power to give away his lands; but what he did not give away, may, and should, pass regularly in succession. C.

The widow had no right to make the gift in question. She had a right to use the property for charitable purposes; but the law limits even these to what may be consistent with her circumstances and condition in life.

E.

ZILLA OF VIZAGAPATAM.

April 9, 1811.

(Ante, vol. i. p. 249. 250.)

A Brahmin woman dying without children, an undivided brother of her husband claimed the ornaments given her on her marriage, as against her father, who insisted upon his right to them. Upon reference,

The Pundit reported it, as his opinion, that, among the three lower castes, the *Stridhana* of a woman, dying without children, or grand-children, belongs to the relations of her husband, unless married in the form of *Asura*, in which case her own parents would be entitled to it. In the case referred, he certified that the ornaments in question vested in her husband's brother.

Remarks.

This agrees with the Mitacsh. on Inh. ch. ii. sect. xi.

C.

The descent of women's property is in all cases governed by the form of marriage. There are eight different forms, and if the rite be celebrated according to any of the four approved ones, (the *Brahma* and the rest,) the property goes to the husband, and husband's relations: if according to one of the disapproved ones, (the *Asura* and the rest,) it goes to her own, commencing with her parents. In either case, females are preferred to males, with the exception of the husband in the first instance; at least so I understand the law, according to the school in which I have studied it.

E.

ZILLA OF COMBACONUM.

August 13, 1807.

Anuntaramiar, *v.* Vencata Narrain.

(Ante, vol. i. p. 250.)

The Plaintiff, on the death of his daughter-in-law, seeks to recover the jewels which she wore, partly given her by him, partly by her father, the Defendant. The Defendant resists the action, on the ground of his having maintained her for six years subsequent to the death of her husband; in the course of which he parted with them for her support.—*Qu.* If the Plaintiff be entitled to recover?

Answer.

The Plaintiff is entitled. Had the Defendant's maintenance of his daughter been at the instance of the Plaintiff, it might be otherwise.

Remarks.

The husband's nearest kinsman is heir to a woman's separate property. Mitacsh. on Inh. ch. ii. sect. xi. 11. The Plaintiff would have been liable for the reasonable charges of his daughter-in-law's maintenance, had he refused or neglected to support her. C.

I conclude that, on the death of the daughter-in-law, the heir to her jewels, as women's peculiar property,

would be her husband, if living. He being dead, it seems to rest between her husband's father and her own parents; the former succeeding, if the marriage were according to one of the four first forms noticed in the Mitacshara, ch. ii. sect. xi. 11; if otherwise, the latter.

D.(1)

(1) William Dorin, Esq. one of the Judges of the Sudder Dewanny Adawlut of Bengal.

SUMMARY,

Extracted from p. 100, *of the Daya Bhaga of Jimuta Vahana.*

(Ante, vol. i. p. 251.)

The settled order of succession to the separate property of a woman is as follows:—

In the case of property left by a maiden, the right devolves first on the uterine brother; or, if there be none, on the mother; but if she be dead, on the father.

It is the same in respect to property left by a betrothed damsel, excepting what was given by the bridegroom: for he has a right to whatever he gave.

In regard to the property of a married woman, which was received at her marriage, her maiden daughter has the first claim, and next a betrothed one: but, on failure of both these, her married daughters who have, or are likely to have male issue, inherit together; or, on failure of either of them, the other takes the succession. If there be none of either description, the barren and the widowed daughters have an equal right; and, on failure of one, the other succeeds. Next, the right devolves in order on the son, the daughter's son, the son's son, the great-grandson in the male line, the son of a contemporary wife, her grandson, and her great-grandson in the male line;—with this difference, that, according to Jimuta Vahana, the right of the daughter's son follows that of the contemporary wife's son.

In the next place, if the property were received at the time of nuptials, celebrated in one of the five forms denominated *Brahma*, &c. the order of successors is husband, brother, mother, and father. But, if it were received at nuptials in one of the three forms called *Asura*, &c., the order is mother, father, brother, and husband.

Then the husband's younger brother; after him, the son of the husband's younger brother, and the son of his elder brother; next, the sister's son; afterwards, the husband's sister's son; then the brother's son; after him, the son-in-law; next, the father-in-law; subsequently, the elder brother-in-law. In the next place, kinsmen allied by funeral oblations *(sapindas)*, in the order of proximity; after them, kinsmen connected by family *(saculyas)*; and, lastly, such as are allied by similar oblations of water *(samonadacas)*.

In the case of property given by the father, at any other time but the wedding, a maiden daughter succeeds in the first instance; next a son; then a daughter who has, and one who is likely to have, male issue; after them, the daughter's son, the son's son, the great-grandson in the male line, the son of a contemporary wife, and her grandson and great-grandson in the male line; next to these, the barren and widowed daughters inherit together; afterwards, the succession proceeds as before described, in the case of property received at nuptials, denominated *Brahma*, &c.

But, in the instance of property not received at a wedding, and other than such as is given by the father, the son and unmarried daughter inherit together; or, of

failure of both of them, the daughters who have, or may have, male issue; and afterwards the son's son, the daughter's son, the great-grandson in the male line, the son of the contemporary wife, her grandson, and great-grandson in the male line, are rightful claimants in succession. Next to these, the barren and widowed daughters inherit together; and lastly, the order is, as before, the same with that of property received at Brahma nuptials.

SRICRISHNA.

APPENDIX TO CHAP. XI.

ON THE TESTAMENTARY POWER.

ZILLA OF BELLARI.

August 18, 1807.

Ch. Veerapah and Others, *v.* Goodummah.

(Ante, vol. i. p. 195. 255.)

To the Pundit.

IT is referred to you to say, whether Veerapah was capable of declaring to his wife, with effect, at the time of his death, that his daughter Goodummah should be heir to his property.

Answer.

Provided no distribution of property have been previously made by a man in his family, he may bequeath it as he pleases, land excepted.

Remark.

This is no answer to the question put. The question is, whether the husband could competently declare that the daughter should succeed to the wife's property?—Certainly, the husband cannot so dispose of the wife's property; beside which, the declaration in the case was

useless, as the law gives the mother's property to the daughter. A father cannot " bequeath as he pleases." He may distribute his property, but he must do it according to law; and if the distribution be otherwise made, it may be set aside, on the complaint of any party concerned. How can the father in such a case be said to bequeath? I should like to know how this, and similar terms, are expressed in the original of this paper. It would puzzle any one to translate them into any of the Indian languages, with which I am acquainted. E.

MADRAS, SUDDER DEWANNY ADAWLUT.

(Ante, vol. i. p. 195. 255.)

Questions.

1. Can a Hindoo dispose of his property by will?

2. Can a Hindoo of an undivided family do so?—to any, and what extent?

3. Whether one of an undivided family, consisting of two only, may so dispose of half the property, leaving to the survivor the remaining half only?

Answers.

1. He can.

2. He can dispose of his share, though undivided.

3. There existing only two shares in the family, either parcener may bequeath his share.

It is thus ordained in Jagannatha, in the chapter called Daya Bhaga, and Datta pradanecam.

(Signed) VENCATASA, *Sastree.*

Remark.

It may be asserted with confidence, in opposition to Vencatasa, first, that a Hindoo cannot make a will at all; secondly, that, in case of family property, he can execute no deed that can have the effect of a will. Moreover, that no authority can be found, in the work to which he has referred, for the contrary opinion. The

father cannot even divide property during his lifetime, otherwise than as prescribed by law; how then can he so bequeath it after his death? If it be said, that he must bequeath according to law, what then is the use of such an instrument? It will be answered, to direct the conduct of his children. To which I reply, True, such an instrument may be proper; but it is not a will, submission to it being optional. Vencatasa (the Pundit) did not understand the meaning of the word used to express the English term will, in these questions. E.

PROVINCIAL COURT, MASULIPATAM.

April 21, 1810.

Situ Binjee Ramandoss — *Appellant;*
Baugheeradhi Boya - - *Respondent.*

(Ante, vol. i. p. 258.)

Question to the Pundit.

If a man should make his will, and deliver it to the person appointed by it to succeed to his estate, but the will be contrary to the disposition which the law would make, which takes effect, the will, or *Dharma Sastra?*

Answer.

Be it will, or any other instrument, if contrary to Dharma Sastra, it cannot be held good.

Remark.

Most undoubtedly it cannot. What then is the will of a Hindoo? If the distribution of property made by it be contrary to the provisions of the Dharma Sastra, it is invalid ; if in conformity with them, it is unnecessary.

E.

PROVINCIAL COURT, CHITTORE.

April 22, 1808.

(Ante, vol. i p. 258.)

A Sudra left two wives, with one son by the first, and three sons and two daughters by the second; of whom a son and a daughter remained unmarried at his death. By a will that he left he directed that, after certain deductions specified by him, his estate should be divided equally among his four sons. The will accompanies, referred to the Pundit for his opinion.

Answer.

Examining the will by the various authorities on the subject of division of property, the first thing observable, is the promise mentioned in it of a thousand pagodas in jewels to the first wife, on taking a second, upon the alleged incapacity of the first to fulfil the conjugal rite, though it b admitted that she had born the testator a son. If wealthy, he should have given her on the occasion a third of what he possessed; and at all events his obligation to maintain her continued. Supposing her not to have received any *Stridhana*, or portion from her husband, or father-in-law, she was entitled to so much as might be expended in the second marriage. Where there has been a *Stridhana*, it should be deducted, and the difference given.

The will further directs that a hundred pagodas should be allowed for the marriage of his youngest son, a hundred for his education, and another hundred for his livelihood; besides the jewels worn by him, his shawls, and best clothes, with the silver and brass vessels, cot, chest, &c. and furniture. It being agreeable to Sastra that when brothers divide, the marriage of an unmarried one should be provided for out of the common stock, an allowance on this account is proper; but, as the younger son is to share the residue of the paternal property equally with his brothers, the deduction of two hundred pagodas for his education and livelihood is objectionable. And, as the allowance grantable from the common estate of one-twentieth extra for the eldest son, a fortieth for the middle one, and an eightieth for the youngest, is abrogated in the *Cali yug*, his making a deduction of jewels, &c. in favour of his youngest, without any correspondent gift to his eldest and middle one, is entirely contrary to Sastra.

The will goes on to give to the unmarried daughter the jewels worn by her with a hundred pagodas for her marriage, and another hundred for more jewels. The appropriation of the jewels worn by her is right. There being four sons, and one unmarried daughter, her proportion of the estate is a *twentieth part*. If therefore the two hundred pagodas, bequeathed for her wedding and future ornaments, do not exceed a twentieth (1) of the property left, the bequest is good; otherwise, not.

(1) There may be authority for this; but one-third from each share is the preferable law.

As to the bequest of their jewels and clothes to his wives and daughters-in-law, it is good only for those that have been commonly worn by them, not for any others. If among the latter there is any great difference among them in point of value, there should be an apportionment.

As in the Saraswati Velasa, in which the customs of the different castes are declared, *Patni bhaga*, or parts by wives, is distinctly stated as the law of the Sudra; the will in question having substituted *Putra bhaga*, or parts by sons, being the will of a Sudra, is in this respect exceptionable.(1)

The appropriating the *dulvar* garden at *Conjiveram* to charity, and declaring it not to be saleable or mortgageable, with a direction that, after the expenses attending it shall have been paid, the residue of the profits should be given to the church; this is consonant to *Sastra*. All parties should take care that the repairs are done, and that the charity be supported.

(Signed)
ALAGA SINGANA CHARY, *Pundit*.

Remarks.

Mr. Colebrooke's caret.

This is an excellent opinion, as are most of Singana Chary's. One or two points may be disputable, but the whole evinces consideration, knowledge, and judgment. With respect to the latter, however, I must make an ex-

(1) Vid. ante, p. 285.

ception to the last paragraph but one, "as in the Saraswati "Velasa," &c. It is true that *Patni bhaga*, division by wives, exists, and is allowable among Sudras; but the authority quoted does not intend that it is "essential" to them. If it had been proved that *Patni bhaga* has customarily existed in the *cula* (tribe) to which the parties concerned in the suit belong, it should be admitted; if not, the general law must in all cases be preserved: it was a mistake, therefore, in the Pundit to question the will for not following the division by *Patni bhaga*. Why indeed he refers to the Saraswati Velasa at all may be asked, considering that the Mitacshara and Madhavya are of much higher authority, in the country where the court to which he belongs is established, and that these do not even recognize the *Patni bhaga*.

In another point of view, this opinion is very satisfactory; I mean, as regards the competency of a Hindoo to make a will. Alaga Singana's authority must be admitted to be good, if the opinions in all the cases referred by the Provincial Court at Chittore (by far the most correct of any in these papers) be his. And it is evident that he does not acknowledge validity in any will, but as it agrees with the distributions of the *Sastras*; which, no doubt, is the correct result in law. What then becomes of the legality of admitting them to probate, in the manner practised in the several supreme Courts; a course that has always appeared to me incongruous? E.

ZILLA OF CHINGLEPUT.

July 9, 1803.

(Ante, vol. i. p. 32. 169. 177. 259.)

A man having, for a length of years, fostered and maintained a boy, not his son, on his death-bed directed half of his estate to be given to his son, a quarter part to his brother-in-law, and a quarter part to him whom he had so bred up: but the gift was not in writing. It is proved however, by two witnesses. Is it good by the Sastra, or not?

Answer.

If one having maintained another for a long time, should be inclined to give him and his brother-in-law a moiety of his property, giving the other moiety to his son, he should do it in the presence of his relations, and of some of the people of the village where the land, if any, lies. Should his death be too sudden to admit of their attending, provided he had declared his intent, and poured water into his hands in the presence of his wife and son, and of the people about him, it should be equivalent to its being committed to writing. And though even this formality should not be observed, it will be good in law for money, though not in regard to land.

(Signed) T. Kistnama Chary.

Remarks.

This is gift in contemplation of death, subject to the general rules regarding gift. See Mit. on Inh. ch. i. sect. i. § 31, as to the form. C.

The whole formality must be completed with regard to land, and possession must be given, or the act is invalid. But what has such a conveyance to do with a will? With the consent of his sons, and wife, and the knowledge of his nearest of kin, a man may make a distribution of his property according to the rules laid down by the law in such cases; and such distribution will be good, whether made on his death-bed, or at any other time, and whether confirmed by writing, or not. But how does such an act resemble a will? E.

ZILLA OF VIZAGAPATAM.

(Ante, vol. i. p. 255. 258.)

If a man in the Cshatrya tribe shall have disposed of his estate to a near relation, by means of an instrument purporting to be a will, leaving a childless widow, and a childless stepmother, surviving him, will it be repugnant to the Hindu Shaster to give effect to it?

(Signed) GEORGE PASKE, *Judge.*

Answer.

A Cshatrya having neither son, grandson, or nephew, may dispose of his estate as he thinks proper, subject to the obligation of him, in whose favour he does so, to support the females of the family, so long as they conduct themselves properly, they having no other means of maintenance.

(Signed) DUSKY NARRAIN, *Sastraloo.*

Remarks.

The wife succeeds of right in this case. Dusky Narrain supports the common opinion of the wife being entitled to maintenance only. This is not law, as I have already shewn. This instance is almost the only one in which I have had occasion to differ with this Pundit. E.

The first part of this is conformable to the law of gifts, to which wills must be assimilated; not being otherwise known to the Hindu law. The maintaining the females is a moral, rather than civil, obligation in the legatee. C.

Where a native of Bengal, of the name of Juggul Kishn, had, by will, divided his property between his wife and son, making them his executor and executrix; and the Pundits, to whom it was referred, both as to the competency of the disposition, and the right vested by it in the widow, had reported in favour of its validity, and that the widow's power over the moveable portion of it was absolute;—the case and opinions, having been submitted to Mr. Sutherland, of Bengal, produced from him the following

Remarks.

With respect to the instrument submitted to the Pundits, I regard it as wholly valid, provided no part of the property conferred by it on the widow were real ancestral property. Such property, by the law as received in Bengal, Juggul Kishn could not aliene from his son without his assent; and it would not therefore pass to the widow by his will. The widow would have absolute power only over the moveable property she might acquire under it, but not over the real. A woman is independent with respect to her immoveable *Stridhana*, other than that derived from her husband.—See vol. i. p. 26.

The doctrine of the Mitacshara, and other authorities of the same school, is mostly at variance with that of the Bengal. In conformity with such doctrines, I am induced to believe, that the instrument in question would pass no real property of whatever description to the widow; it not being, according to them, competent

to the husband to make such a gift to her, without the assent of his sons; which, from all that appears, was no in this case obtained.

It may be observed that, in the proper chapter, the Mitacshara is wholly silent on the subject of the power ot women to alienate their peculiar property; though explicit in disavowing all authority in the husband, &c. to appropriate the same. A text of Vishnu is cited in the commencement of the work on inheritance, to shew that property is not by birth alone; from which text it appears, that, with the exceptions of immoveable property, on the death of the husband, the wife may dispose, as she pleases, of his affectionate gift.(1) S.

(1) See Mit. on Inh. ch. I. sect. i. 20.

Answers to the annexed Questions, by Mr. Colebrooke.—
(See Letter dated Calcutta, May 18, 1812, ante, p. 134.)

(Ane, vol. i. p. 25. 258.)

Quest. 1st. Can a Hindoo dispose of his property by will?

After much consideration of the question, when agitated some years ago, it was here settled, that a will, (though this disposal of property be unknown to the Hindu law, as was remarked by Sir William Jones,) must nevertheless be held valid in the case of a Hindoo; being in fact a gift made in contemplation of death, which the Hindu law, if it do not directly sanction, contains at least nothing to prohibit. Considering it then as a gift to take effect at a future time, determinable by a certain event, (decease of the giver,) I apprehend it must be governed and controlled by the general rules regarding gift.

2d. Can a Hindoo of an undivided family do so, and to what extent?

According to the authorities of Hindu law which prevail in Bengal, a member of an undivided family may give away, or otherwise aliene property, to the extent of his own share of the joint wealth: and I conceive his disposal of his property by will would be here maintained, *i. e.* within the limits of that province, in conformity with Jimuta Vahana's doctrine, that the gift or other alienation, by an unseparated coheir, may be an immoral act, but is not an invalid one. (Daya Bhaga, ch. ii. § 28. Jagannatha's Digest, vol. i. p. 455.—vol. ii. 103 and

104. 8vo. ed.) It would be otherwise in the rest of the provinces. The writers of the Tirhoot school contend, that the gift is void: and the reasoning, by which they support this position, is perhaps carried too far, as it extends to the annulment of an improvident gift by a single owner. The same may be said of the Benares school.

The authorities which prevail in the Peninsula, or South of India, are nearly as explicit. The Smriti Chandrica declares, that restitution of an unfit gift, *(adeya,)* as well as of a void donation, *(adatta)* shall be enforced by the sovereign authority, because the property is not transferred, nor a new right vested, since the donation is ineffectual when a void gift is made and accepted. An author of eminence in the Benares school (which follows the authority of Vijnyaneswara's Mitacshara) cites this passage, and apparently acquiesces in the doctrine, remarking, that "a man's own acquisitions may be aliened "by him, even without the consent of unseparated bre-"thren." (Such acquisitions, it is to be observed, are the acquirer's separate property, and stand therefore upon different grounds.)

Neither this author, nor any other of the same school, so far as I can find, take the distinction which those of the Bengal school assume, between gifts exceeding, or not exceeding the giver's own share, and between void donations and unfit gifts. Lawyers of Bengal hold, that an unfit gift, *(adeya)* to which class this of undivided property belongs, is immoral, and even punishable, but not void, nor voidable; while one of the other class, termed void donation, *(adatta,)* is null, and also punishable. The Mitac-

shara of Vijnyaneswara makes no such distinction nor exception, though the author explains unfit gifts as comprising, 1st, Such as are not fit to be given for want of proprietary right; and, 2dly. Such as may not be given by reason of an express prohibition. I am entirely at a loss to conceive on what grounds Jagannatha asserts in his Digest, (vol. ii. p. 105.) that his mode of reconciling the discordant opinions of authors, by maintaining the coheir's alienation of joint property to the extent of his own share of it, is consistent with the opinion of Vijnyaneswara. The alienation of joint property is comprehended in this author's class of *gifts unfit*, because they are prohibited: and the only distinction that seems fairly deducible from his doctrine is, that gifts unfit by reason of the want of proprietary right, are necessarily null and void; but that gifts unfit, because they are prohibited by general rules, may be valid under the exceptions which the law allows: such as distress, necessary support of the family, and pious purposes arising from indispensable duties. (Mit. on Inh. ch. i. sect. i. § 29.)

It may be objected to Vijnyaneswara, and the Smriti Chandrica, that the texts, which prohibit gifts of any portion of joint property, or of the whole of a man's sole property, thereby distressing his family, equally forbid sale and mortgage of it: so that these also would be void, although a valuable consideration have been paid and received. Injury and injustice may, however, be prevented, by holding him and his property answerable for the repayment of the money or valuable consideration received by him: and equity perhaps would award parti-

tion, for the purpose of enforcing payment from his share, thus rendered a separate one.[1] But, in the case of a gratuitous alienation, there are not the same difficulties: and I apprehend, that, under the Hindu law, as received among those with whom the Mitacshara and Smriti Chandrica are the chief authorities, it must be held that the disposal by will (considered as gift) of an undivided share of joint property, is not valid; nor of any part of it, unless for pious purposes, or other uses incumbent on the testator to provide for, and falling within the exception which the law makes to the general prohibition.

Accompanying, is a collection of passages from writers of all the different schools relating to this point.

(1) Vid. ante, p. 202.

Extract of a Letter from Henry Colebrooke, Esq. to Sir Thomas Strange, dated Calcutta, May 25, 1812.

(Ante, vol. i. p. 169. 250. 268.)

When writing a few days ago, I stated that I thought a Hindu's will and testament must be governed and controlled by the general rules respecting gifts. It will hold good, I think, for the same things for which a gift made in his lifetime would do so, and no otherwise. I should have added, however, that his legacies to his family must be controlled by the rules regarding partition made in his lifetime by him, as father of the family. The principle I would lay down, is, *that a man cannot confer on a stranger, or his own kin, by will, (which I consider to be a donation in contemplation of decease,) what he could not bestow by deed of gift, or partition of patrimony.* The utmost that can be said, is, that he may do that by testament, which he could have done by partition, or donation between living persons. This is allowing all the force that can be given to a will, by taking it as a gift, in regard to what the testator has power to give; and, as a partition of inheritance, in regard to what he can distribute, but not give away.

The Pundit, who set about reforming a will to make it square with the law, in the case before the Court of the Centre Subah,(1) seems to have viewed the testament exclusively as a deed of partition of heritage.

Upon the principle which I have stated, a *Hindoo in*

(1) Ante, p. 422.

Bengal may leave by will all his own acquisitions: but would be restricted, if he have sons, from distributing ancestral property according to his mere pleasure. In provinces, in which the authority of the Mitacshara prevails, a Hindoo is restrained from giving away immoveables, and from making any other partition of his possessions among his male descendants, but such as the law has sanctioned. Consequently, he would be withheld from distributing immoveables in a mode unauthorized by the law, but may bestow moveables, of which the law permits him to make gifts on motives of natural affection: not, however, to the extent of his whole property.

In short, if there be no sons, or male descendants, and the property be not shared by a co-heir, the whole of his possessions, being his separate and distinct property, may be disposed of by will, as he pleases. If he have a coparcener, he cannot give away his entire share of the joint property; nor the whole of his possessions, if he have sons.

Extract of a Letter from Henry Colebrooke, Esq. to Sir Thomas Strange, dated Calcutta, July 22, 1812.

(Ante, vol. i. p. 24, 25. 258.)

Upon reference to adjudged cases, and upon consideration of the inferences to be drawn from them, and the principles held to have been settled by these judgments, I find occasion to correct that part of my letter on the subject of wills by Hindoos, in which I said that a Hindoo in Bengal may leave by will all his own acquisitions; but is restricted from distributing ancestral property among his children, according to his mere pleasure.

It is true, that if he make a formal partition of heritage, he is subject to restrictions; and no express decision has weakened the strict rule of law on this point. But a deed of gift, by which the ancestral property was unequally distributed, (or was given to one son with a very inferior provision for the rest,) has been held valid by a solemn decision of the former Court of Sudder Dewanny Adawlut; and I understand that, in numerous instances, wills of Hindoos, disposing of the ancestral as well as acquired property, according to the testator's pleasure, have been allowed by the Supreme Court.

It appears to me an inconsistency, that a man may do that by gift or will which he may not do by a formal partition; and the Hindu legislators might have saved themselves the trouble of providing rules to regulate a father's distribution, if the whole may be evaded by the easy expedient of calling the distribution a gift, instead of a par-

tition. But since the point is here a settled one, what I said on the subject may require modification. A Hindoo in Bengal may leave by will, or bestow by deed of gift, his possessions, whether inherited or acquired; and the gift or the legacy, whether to a son or to a stranger, will hold, however reprehensible it may be, as a breach of an injunction and precept.

Extract of a Letter from Henry Colebrooke, Esq. to Sir Thomas Strange, dated Calcutta, Dec. 13, 1812.

(Ante, vol. i. p. 24. 258. 268.)

In respect to a Hindoo's will, I have, according to my promise, examined the Smriti Chandrica, with the view of furnishing any further information it might contain on the doctrines of Hindu law, which can be brought to bear on the case in question.

I find much difficulty, adverting to the positions maintained in that work, to admit any power in a joint owner to give away his proper share, yet unseparated, of the common property, whether by will, or by gift in his lifetime, without the consent of his undivided brethren. The author of the Smriti Chandrica, speaking of common property, of which a gift is forbidden by the law, observes, that this regards common ways, and other things common to many; but property belonging to an undivided family (he says) may, in certain circumstances, be given away, since the consent of all parties concerned may be easily had in this instance, though not so in the case of a public way, common to great numbers. It is afterwards observed, that an owner may give away his own acquisitions, without the consent of his undivided brethren, but not so joint hereditary property. The author, however, goes still further in regard to *immoveables;* restricting a *sole owner* from selling, pledging, or giving away, without consent of kindred, *immoveable property acquired by himself*, *unless* it exceed the neces-

sary subsistence of the family, or unless the wants of the family, or other distress, require it to be parted with.

This last restriction naturally suggests the doubt, whether the prohibition in this, or in the former case, is to be taken as invalidating the act of an owner, who shall persist in disposing of his property against the injunctions of the law. But no hint of such a distinction (which is to be found in the writings of the Bengal school, between gifts valid, though forbidden, and gifts either void or voidable) is contained in the Smriti Chandrica. The author, on the contrary, maintains, that forbidden donations shall be set aside by the sovereign authority; and it seems more consonant to his doctrine to say, that the owner's disposal of his share of undivided hereditary property, without assent of partners, is voidable.

I intended to have completed a similar examination of the Madhavya, with reference to the same point; but the book is not just now at hand.

Extract of a Letter from Henry Colebrooke, Esq. to Sir Thomas Strange, dated Calcutta, Dec. 26, 1812.

(Ante, vol. i. p. 258, 268.)

I have examined the Madhavya since I wrote to you; and find nearly the same opinions as in the Smriti Chandrica, more concisely expressed; but with a restriction of some importance. Madhaveya observes, in regard to moveables, that property, which a man himself acquired, may be aliened by him, without the assent of brethren, with whom he has made no partition of wealth; but not so in regard to immoveables; adding the remark, that property inherited from ancestors may be given away by the chief brother, with the assent of the rest. He appears to consider all the passages cited by him in this place, as relating to immoveable property; and it may therefore be questioned, whether he contemplated any restraint on a joint proprietor from giving away moveables, not exceeding his own share of undivided wealth.

The subject is certainly one of considerable difficulty: and I have all along felt much at a loss to give a decided opinion on the question of a Hindoo's will, under the law, as it prevails in your part of India.

BENGAL.—ZILLAH BAKUR GUNJ.

Chundra Mala—A . . . }
Ubhya—B . . . . } *Appellants.*
Ram Priya—D . . . . . }
Daughter of Oopurna—C } *Respondents.*

(Ante, vol. i. p. 169.)

Lukhee Priya, a woman of the Hindu persuasion, and a widow, had four daughters, A, B, C, and Pran Priya deceased; in favour of whom she executed a deed of gift, by which she assigned a share in a Zemindary to those persons, to be equally divided amongst them, inserting, however, in the deed the following provision: "That, during her life, she should make the collections of "revenue as before, through her agent, but that, after her "death, her four daughters, with their husbands, should "be fully in possession of their several allotted shares." During the lifetime of Lukhee Priya, her daughter C died, leaving a husband, and a daughter, D, who claims the share of her mother. The Pundits of the Sudder Dewanny Adawlut were required to state whether, under these circumstances, such claim is valid, according to the Hindu law.

The substance of the answer of the Pundits was as follows: That, supposing the deed of gift to have contained a restriction, (niyama,) that the donees should have no property in the gift (*i. e.* be incompetent to give or sell it) till after the death of the donor, and that it had been

executed, without the sanction of her (the donor's) guardians, (a gift so made being invalid,) no right in C, who died before the donor her mother, to the share assigned to her in the deed was established; and, consequently, *à fortiori*, none existed in her daughter D. That the right in the share in question reverted to the donor.

Authorities cited.

From the Sudhitatwa, a text of Nareda cited in the Daya Bhaga and other books, and a text of Catyayana.

The first shewing that a gift involving a condition, is not *valid*, till the accomplishment of such condition.

The second shewing the dependency of a childless widow on the "*Swatantras*," or her guardians of her husband's family.

The third shewing that the gift, or other alienation of land, &c. made by a widow, (aswatantra,) without the leave of the *Swatantras*, is not valid.

In illustration of, and resulting from the above exposition of the law, (Vyavastha,) the Pundits made the following explanation, and declared the subjoined points of Hindu law.

No right of D, under the circumstances of the case, would have existed, allowing that Lukhee Priya had obtained the leave of her guardians to dispose of the property as expressed in the deed.

The mention of such leave was only made, to shew the necessity for it, in order to give validity to such an act of the widow Lukhee; and consequently the validity or

otherwise of the gift made in favour of the three donees, who had survived the donor, depended on the circumstance of the donor's having, or not having, obtained the leave of the persons alluded to. The Pundits, it was to be observed, did not from the deed (written in the Bengallee language) understand it to contain any thing establishing the right of the husbands, as joint donees with their wives, the daughters of the donor: which might be inferred from the statement of the case. The points of Hindu law declared by the Pundits were these:—

Whatever act affecting his property a Hindoo was competent to perform, his widow, on whom such property by the operation of the law may have devolved, with the sanction of her guardians, may execute. In Bengal, according to the law as there received, a Hindoo may aliene, by gift or otherwise during his life, to whomsoever he pleases, land, and other property, *without reference* to the *manner* in which the same may have been *acquired*.(1) Should he give away, or otherwise aliene *patrimonial* land, without the concurrence of his sons, in a manner other than that in which it would have devolved by law, such gift, or

(1) This is the tenour of my MS. containing the result of the conference which I had with the Pundits of the Sudder Dewanny. I well recollect more than once minutely explaining to them what I had written, and their admitting that I had correctly stated their opinion. It appears, however, that an inadvertence on their part, or a mistake on mine, was here committed. By the doctrine of the Daya Bhaga, (which is the groundwork of the Hindu law of inheritance, as received in Bengal,) it is most clear, that a man may not aliene his real ancestral estate without the consent of his sons, &c. And this indeed have the same Pundits, on other occasions, adopted as their opinion. There is no part of the Daya Bhaga so unsatisfactory, as that where the author attempts to prove the absolute right of aliening self-acquired real property; and it may be observed, that the argument used would be equally good, to establish the validity of the transfer of the same property ancestral. S.

alienation is valid, although morally wrong, and the person in question is guilty of an immoral act thereby.

By the doctrine of the Benares school, and that current in the tract of country designated Mithila, a Hindoo may only give away *moveable* property, however obtained. Whatever a Hindoo, according to his pleasure, is competent to give, whilst living, he may assign in the same manner by a will, (*sumbit patra*,) or deed of gift, to take effect after his death. A power, however, of revoking such will, or post-obit gift, always exists; and such a gift or legacy lapses, by the previous death of the donee, or legatee; or, in other words, reverts to the surviving testator, or donor: a difference however prevails, with regard to the act of the husband, and that of the wife, on whom by operation of the law his estate has devolved. He, in his lifetime (in Bengal) might have given away his real estate in any manner, against the consent of his sons, or the heirs, on whom it would devolve by operation of the law; being guilty only thereby of an immoral act.

The wife, on the contrary, on whom her husband's estate has so devolved, must, in the case of her wishing to give away any of such estate, in a manner other than that in which it would devolve by operation of law, *not only obtain the sanction of her legal guardians, but also that of the next heirs; or those whose eventual right would be affected by such gift.* It is to be observed that, in the case in question, the donees are the next, and presumptive heirs to the donor; and the object of the gift appears to have been that of obviating any contingent disqualification to right by inheritance, or the operation of the law;

as, for instance, if either of the daughters should prove barren, and become a childless widow, in which case such daughter, though not an heir, would take, in virtue of the deed of gift, an equal share with her sisters, the whole having tacitly given their assent to their mother's executing a deed, by which a right in the estate might possibly be established in one, not competent to inherit.

S.

Ishaun Chund Roy, . . . *Appellant;*

v.

Ishwar Chund Roy, . . . *Respondent.*

(Ante, vol. i. p. 265.)

Appellant is the uncle of Respondent, the present Raja of Nuddea; and claims from him one fourth of that Zemindary, upon the ground of his being one of the four sons of Raja Kishun Chund, (the grandfather of Respondent,) and therefore entitled to one-fourth of his landed property ,agreeably to the Hindu law. It appears that Raja Kishun Chund bequeathed by two wills (the one in the Bengallee, the other in the Persian language) the whole of the Zemindary to his eldest son Seebchund, who accordingly succeeded to the Zemindary, and obtained a Dewanny Sunnud from government. Raja Seebchund also bequeathed the whole of the Zemindary by will to his eldest son Ishwar Chund, the Respondent. The authenticity of the above wills is established; and a majority of the Pundits referred to have declared them valid, according to the Hindu law. It further appears, from the genealogical table of the family, delivered in by the Canongoes, that the Zemindary of Nuddea, has never been divided; and by the 137th article of the Regulations, it is directed that, in cases of succession to Zemindaries, the judge do ascertain whether they have been regulated by any general usage, of the Pergunnah where the disputed land is situated, or by any particular usage

of the family suing; and do consider in his decision the weight due to the evidence on this head. It appears therefore that the Appellant's claim is contrary both to law, and the usage of the Zemindary.

The Appellant, however, is entitled to a maintenance; and the judge has awarded to him the further sum of S[a]. R[s]. 250 per month, to be paid from the Zemindary, in addition to the sum of 250 R[s]. before received by him; upon the ground that the former sum was inadequate to his situation and circumstances.

(Signed) G. H. BARLOW,
Examiner and Reporter to the Sudder Dewanny Adawlut.

Feb. 23, 1792.

Answer of the Pundit of the Court of the Recorder of Bombay,

Upon a reference to him as to the competency of a Hindoo to dispose of his property by will considerin him first, as a member of an undivided family, and nex as divided. Communicated by Sir John Newbolt, acting as Recorder.

(Ante, vol. i. p. 267.)

There is no mention of wills in our Shaster: therefore they ought not to be made. If it be said that it is lawful for a father to divide his property during his life, that is true; but then it must be done agreeably to the Shaster; he cannot divide it according to his pleasure; and if he does, his partition will be liable to be corrected; so that the Shaster is the only rule. An undivided family having no power individually, but collectively only, no member can, without the concurrence of all, (express or implied,) dispose of any thing. Where a division has taken place, and the family of the individual is sufficiently provided for, an alienation is competent, but not even then of the immoveable property. The deceased member of an undivided family leaving no son, his share of the joint property does not descend to his widow, but survives to the brothers, or other co-heirs. Thus I have written what is the practice of this country.

(Signed) BAPOO, *Pundit of the Recorder's Court,*
4th Madhow of the dark fortnight,
1734, *of Salivahan.*

FROM THE PUNDIT OF THE COURT AT TELLICHERRY.

(Ante, vol. i. p. 255.)

1. Can a Hindoo dispose of his property by will?

According to the text of Nareda, the father is not at liberty to dispose of his property except in due proportion to all his sons, and according to the Shasters; nor does the Shaster authorize a person to dispose of his property at discretion.

2. Can a Hindoo, of an undivided family, do so to any and what extent?

According to the text of Yajnyawalcya, the father has control over pearls, corals, and such like valuables; immoveable property appertains to the issue of the family; the father and grandfather have no control thereupon. The father may, however, bestow clothes and ornaments at pleasure; and the receiving and using the same is warranted. The receiving and using immoveable property from the father will not be held valid. Although the father himself should have acquired property, in addition to the ancient immoveable property, as also bondsmen, he is not at liberty to dispose of the same by sale or gift, without the consent of the family. Such is the ordinance of the Shaster. A member of an undivided family, may, however, dispose of a trifle out of the moveable property as before observed.

3. Can one of an undivided family, consisting of two only, so dispose of half of the property, leaving his coparcener's moiety undisturbed?

It is stated in the text of Nareda, that it is necessary a division should be previously made, with the concurrence of all the members; wherefore the disposing, to the extent of one's share at discretion, is not legal.

Extract of a Letter from Sir Thomas Strange to H. Colebrooke, Esq. dated October 12, 1812.

(Ante, vol. i. p. 267.)

With regard to the question about wills, it came before us in an equity suit, in which an annuitant called upon the Defendant, an executor, to make good to him a provision left him by the will of the Defendant's testator, the parties being Hindoos. The Defendant was nephew to the deceased, who had taken upon himself to dispose *ad arbitrium* of a very large undivided estate, consisting of property of every description. We thought, and held it doubtful, whether a Hindoo could make a will at all; and, at all events, it seemed to us, that he could not so dispose of *undivided* property. The bill was therefore dismissed, the Court not having perhaps sufficiently considered whether he might not do so, to the extent of his own share, especially so far as acquired by himself; assuming, for the sake of argument, the competency of this mode of alienation. Our decision was recent, when I took the liberty of troubling you with questions on the subject; and the property being more than considerable enough to bear extended litigation, we have since directed the cause to be reheard, that these important points, hitherto afloat with us, may be solemnly settled. It will be reheard in the first term of next year. It gives me great satisfaction, in the mean time, to see that you are to be good enough to look into the authorities prevalent with us, expressly for the purpose of enabling you to tell me what the law upon the subject is in this part of India, without regard

to the decisions of the Sudder Dewanny Adawlut, or the Supreme Court at Bengal, founded, as they must be presumed to be, upon doctrines that may not have been adopted to the Southward. Lord Mansfield once, in the case of a void will, took occasion to observe that the Statutes of Distributions (as they are called) had made an exceeding good will for every man. The observation is, I think, applicable to the Hindoo, with whom the law of inheritance seems to me to be well and equitably settled; and, supposing the point to be one of a merely speculative nature, I would rather have property allowed to descend among them, according to their ancient canons, than leave it to every man to prescribe for himself a new law of succession. One thing I observe in all the wills made by Hindoos of Madras, that a great proportion of the property is bequeathed to superstitious uses; the proportion is commonly in the ratio of the iniquity with which it has been acquired, or of the sensuality or corruption to which it has been devoted. *Sic hi non ipsis mellificant.* I would rather see it distributed in their families, &c. &c.

APPENDIX TO CHAP. XII.

ON CONTRACTS.

PROVINCIAL COURT, CHITTORE.

June 21, 1811.

(Ante, vol. i. p. 275. 309.)

On an engagement in writing, to pay a sum of money, the Defendant admitted the writing, but refused to pay, alleging that he gave it for an appointment to the situation of *Sheristadar*, and for no other consideration. The Plaintiff proving no other, the Pundit reported as follows:—The engagement is void by the Hindu law, the consideration being a corrupt one. If one, sued for a debt, disputes it, but it is proved against him, he must not only pay the demand, but, for falsely denying it, he is liable to be fined in a sum equal to the amount. On the other hand, if the Plaintiff fails, he is liable in double the amount, for his false claim.

Remarks.

"The Hindu law allows a corrupt payment to be re-" covered, on proof of the corrupt consideration. Ja-" gannatha's Digest, b. ii. ch. 4. lx. For the law im-" posing a penalty on the party that is cast, See Id. b. i." ch. 6. cclxxvi."

C.

"Falsely denying," and "failing in proof," are terms admitting of great latitude of interpretation. Construing the words of the Pundit literally, it would appear he thought an equal sum should be taken from the Defendant, and double from the Plaintiff, on their respectively failing in their suit, or defence; but this is not the law. The law is, that these are the highest rates of fine, that are in any case to be imposed; to be mitigated, or relinquished altogether, as the king, in his discretion, may judge of the conduct of the parties. Menu says, "a small fine" only shall be taken from the Defendant; and certainly, the moral guilt of resisting a just claim, can never be so great as that of pursuing a false one. Other authorities ordain other rates for both. E.

ZILLA OF BELLARI.

July 1, 1807.

Timmarah, *v.* Veneapah.

(Ante, vol. i. p. 167. 277.)

Upon the trial of this action, a certain sum has been awarded to the Plaintiff, which the Defendant is incapable of paying; but the Defendant's son has a shop in Bellari, where he carries on business, and no division of property having taken place between the father and son, does the Shaster authorize the son's being called upon for the sum in question?

Answer.

For a debt incurred on account of the family, the head of it shall be held responsible; but should a father contract one for the purchase of spirituous liquors, or debauchery, or other improper objects, it is not obligatory on the son; nor shall a son be called upon to pay his father's debts, till he have attained his legal age. Subject to these considerations, it appearing in the case referred, that the Defendant's son is on the spot, and the father insolvent, the son ought to pay the sum in question.

(Signed) RUNGACHARY, *Pundit.*

6*th July,* 1807.

Remarks.

See Yajnyawalcya, cited by Jagannatha, b. i. v. 170, and the Commentary.

It is not expressly said that the debt shall be paid by the son, in the lifetime of his father, who is insolvent. It is however declared, that he shall pay the debt of a father, who is oppressed by calamity, such as incurable disease, &c.; and that even though no patrimony come into his hands. But, according to the remark of Sir William Jones, the obligation is moral and religious, not civil. See note to 1 Dig. p. 266. C.

ZILLA OF BELLARI.

December 8, 1807.

Pamdhortee Vencata Row, *v.* Shekh Munktoom.

(Antè, vol. i. p. 167. 276.)

The Plaintiff in this cause, during the absence, and without the knowledge of Defendant, got a bond executed in his favour, purporting to be the obligation of the Defendant, and the Defendant's mother; but subscribed by the mother alone. This being the case, is the Defendant responsible for the amount?

Answer.

According to Kartyancha, " when a man leaves his " home, and a debt for the good of the family is con- " tracted, whether by his slave, his mother, his wife, or " his scholars, the head of such family must pay the debt; " and if he is absent his son must discharge it." In the case before us, if the Plaintiff got the Defendant's mother to write a bond in his favour in her own name and that of her son, without informing the Defendant thereof, it is not a good bond; yet, if the mother contracts a debt to defray the family expenses, the son must pay it; but if it was contracted on her own account, she must pay it herself.

(Signed) RUNGACHARY, *Pundit.*

Remark.

Unless there is positive proof that the debt was contracted for the support of the family, destitute of all other means of subsistence, the son would not be liable in this case. E.

See the principle stated in Jagannatha's Digest, book i. texts clxxxix. cxci. cxcii. cxciii. and clxxxi.

ZILLA OF COMBACONUM.

Feb. 26, 1807.

(Ante, vol. i. p. 277.)

The Plaintiff lent five hundred gold chuckrums to one Chinnapan, the son of the Defendant, who thereupon gave him a writing for the money in the name of his father; and Chinnapan being since dead, is the debt recoverable against the Defendant, the father?

Answer.

There being no proof that the writing was given by the authority of the father, or for the support of his family, it cannot be enforced against him.

Remarks.

"See Nareda, cited by Jagannatha, Dig. b. i. text "cxciv." C.

"Certainly not." E.

ZILLA OF COMBACONUM.

May 3, 1808.

(Ante, vol. i. p. 289.)

Upon a judgment for the Plaintiff, and an order to sell the land of the Defendant in satisfaction, a third party intervening, alleges the land to be in mortgage to him, for money borrowed, of which proof is adduced. Is the land, under these circumstances, liable to be sold in satisfaction of the judgment, subject to what is due on the mortgage?

Answer.

It may be so sold, for the proposed purposes.

Remarks.

"Certainly it may be sold, subject to the mortgage. "See Jagannatha, on a passage cited in the Dig. b. ii. "ch. iv. 28." C.

"This species of assignment of land is in very frequent "practice, where proprietary right in land exists, and is "commonly called *Bhogyam*, '*that which is to be en-* "'*joyed.*' The holder of land in *Bhogyam* tenure is, in "every thing but name, the owner; he cultivates, pays "the land-tax, and all other dues, and enjoys the whole "produce; and he may also, if there be no special agree-

" ment to the contrary, dispose of his interest in it. The
" original proprietor retaining solely a right of redemp-
" tion, (never abateable,) it is this latter right only that is
" saleable, to answer any other demand upon him. In
" the province of Malabar, whole districts are thus hypo-
" thecated, the *Jummum* right, or superiority, is con-
" stantly transferred, without in the least affecting the
" occupancy of the land, or the rights of the occupier."

E.

ZILLA OF CHINGLEPUT.

July 10, 1807.

(Ante, vol. i. p. 288.)

Kesavummall, *v.* Sreenivasiangar.

On examination of the accompanying petition and depositions, &c. it is referred to the Pundit to say, whether the Plaintiff's suit be maintainable for the land mortgaged to him, or for the money lent?

Answer.

The term stipulated for payment having expired, and the money not paid, the land having been assigned for enjoyment, the Plaintiff can sue only for the land, not for the money borrowed upon it.

(Signed)

TEROOMALY KISTNAMA CHARIAR, *Pundit.*

Remarks.

There is nothing directly in point.- If a sale were in the contemplation of the parties, it is become absolute, and no suit can be brought for the money. If the usufruct were accepted in lieu of interest, the creditor could not come upon the debtor for the insufficiency of the pledge. But if the pledge were merely security for the debt, surely the creditor may claim his money. C.

Lands held in *Bhogyam*, under agreement with the proprietor that they shall pass in full proprietary to the holder, in case certain conditions are not performed, pass accordingly, on failure in the performance of those conditions. Money cannot be recovered, because the payment of money is not stipulated. E.

ZILLA OF CHINGLEPUT.

August 20, 1803.

(Ante, vol. i. p. 289.)

Above thirty years ago, the owner of a garden mortgaged it for forty pagodas, agreeing that the lender should have the use of it, in lieu of interest; but without delivering the garden accordingly. Is the money, which remains due, still recoverable?

Answer.

The money borrowed, with the interest due upon it, is recoverable. If the debtor be unable to pay, the mortgaged property must be sold, and what is due discharged out of the proceeds.

Remarks.

The default of the debtor, in not delivering the pledge, certainly did not exonerate him from the debt. But the lapse of time might have been taken advantage of against the creditor, who should have sued for the possession of the pledge which was withheld (Vrihaspati, cited by Jagannatha, b. 1. cxxvi.) within twenty years. (Yajnyawalcya, ibid. cxiii.) For, although pledges are excepted from the rule of limitation, the exception must be understood to relate to such as are in the hands of the pledgee.

C.

To the same effect, by E.

ZILLA OF COMBACONUM.

April 2, 1811.

(Ante, vol. i. p. 289.)

If lands are pledged as *Adhi* or *Bandhaca*, (two different forms of security,) with a condition, that if the money borrowed be not paid at the time agreed, the mortgagee shall enjoy them, upon the condition being broken, can the mortgagor redeem his land, by payment of the money after the time?

Answer.

If the land remained in possession of the mortgagor, he may;—otherwise, if the mortgagee had been let into possession.

Remark.

There is not any passage of law expressly in point, regarding the distinction taken in the answer. It is assumed, seemingly, from passages, which inculcate the necessity of possession of a pledge. (Jagannatha, Dig. b. 1. cxxv. cxxvi.) If the creditor have possession of the pledge, or a lien on it, he should proceed in the manner indicated by passages of Yajnyawalcya, &c. (Jagannatha, b. 1. cxxiii.) In no case can the pledge be forfeited without that formality, or a time allowed to the debtor, (ibid. cxv. cxvi.) which implies notice to him. If he have not possession, he of course could not foreclose, without notice and application to a tribunal. C.

ZILLA OF CHINGLEPUT.

Jan. 15, 1805.

(Ante, vol. i. p. 289.)

The plaintiff sues on an instrument purporting to be a mortgage for money borrowed; but the mortgagee never having had possession, is it valid as a mortgage deed?

Answer.

The deed (referring to it) purporting that Veneatasa Pillay and Teroovergada Pillay had mortgaged the ground in question, and borrowed one hundred and eight pagodas, on condition that the money should be paid within a time that is past, and, if not, that then the lender should be at liberty to sell the land; the lender never having had possession of it under the deed, in any manner, or part, the deed has no validity as a mortgage deed.

(Signed)

TEROOMALY KISTNAMA CHARIAR, *Pundit.*

Remarks.

This is founded on passages which inculcate the necessity of possession, to ensure the validity of a pledge or mortgage. See Jagannatha, b. 1. cxxv. cxxvi. It is of course not applicable to a sort of mortgage much in use in Hindostan, termed *Drishta bandhaca*, where the pledge is assigned to the creditor as a security, without possession, or intention of possession, till the stipulated time arrive.

C.

Yajnyawalcya says, " In the acquisition, where there " is *not any* assignment, there is no validity." But the *least* would do :—for example, if the mortgagee deed had been drawn up in the house mortgaged, both parties being present, *actual* enjoyment, (possession,) *or*, if the key had been delivered to the mortgagee, *virtual* possession might be inferred. E.

ZILLA OF CHINGLEPUT.

Jan. 15, 1811.

(Ante, vol. i. p. 289.)

The land of the Defendant being under sequestration for a debt, it appears that it is under mortgage to another for money borrowed, but not yet payable. Can the sequestration be enforced?

Answer.

It having been agreed that the mortgagor should remain in possession, till default of payment, the house cannot be sold under the sequestration, till the mortgagee be discharged.

(Signed) ALAGA SINGANA CHARIAR, *Pundit.*

Remarks.

This mortgage is of the description called in Hindostan *Drishta bandhaca.* Being prior to the sequestration, it must be satisfied, before any part of the mortgaged property is applied to the liquidation of another debt.

C.

To the same effect, by E.

ZILLA OF VERDACHELLUM.

Jan. 30, 1807.

Narrain, *v*. Soonia Moodiliar.

(Ante, vol. i. p. 289.)

The father of the Plaintiff, having near thirty years ago, lent money upon mortgage, is a suit for its recovery now maintainable?

Answer.

1. When money has been borrowed on mortgage, without any period specified for redemption by payment, it may be sued for at any time.

2. Where a time is limited, but not kept, and the thing mortgaged has, in default of payment, been expressly substituted, a suit is not maintainable for the money, after fourteen days from the day of payment.

3. If the agreement be, that the lender should enjoy the profits of the thing mortgaged, in lieu of interest,—in such case, a right to recover continues as long as the money remains nnpaid.

(Signed) SREENEVASA CHARLOO.

Remarks.

1. This is applicable, where the profits are not accepted in lieu of interest.

2. That is, if the creditor have foreclosed the mortgage, and taken the property in discharge of the debt, (Jagan-

natha, Dig. b. 1. cxvi.) he cannot afterwards come upon the mortgagor.

3. No suit can be maintained to enforce payment before the mortgagor is disposed to redeem his pledge. The creditor has accepted of the profits in lieu of interest, until the owner's convenience. C.

ZILLA OF COMBACONUM.

May 20, 1808.

(Ante, vol. i. p. 297.)

Upon a note for a sum borrowed, payable at a certain day, is the lender bound to receive it, if tendered to him by the borrower before the day?

Answer.

He is not.

Remarks.

This is obviously right, though the Hindu law is silent on the point. C.

The Hindu law of contract being founded entirely on reason, and not on special ordinance, or national usage, the only observation of which the opinions ranging under this title are susceptible, is a general one; viz. that when they contradict common sense, they must be wrong. To this, I am aware of but one exception, namely, the assignment of rates of interest, increasing in the inverse order of the castes; a practice, though expressly ordained by the law, now seldom observed. E.

ZILLA OF BELLARI.

June 8, 1807.

Timmanah, *v.* Veneapah.

(Ante, vol. i. p. 299.)

The Defendant, some years ago, executed a writing to the father of the Plaintiff, binding himself to the payment of one hundred pagodas, borrowed with interest at twelve *per cent;* and now the interest, exceeding the principal, to what extent is he liable?

Answer.

According to Menu, when the debtor, from the long standing of the debt, is unable to pay both principal and interest, he is compellable to pay the interest only, and to give a fresh engagement for the principal. If, in such a case, the interest equals the principal, the debt is to be liquidated by payment of one-fourth.

(Signed) RUNGACHARY, *Pundit.*

Remarks.

See Menu, ch. viii. v. 154. The principal can only be doubled. See Harita, cited by Jagannatha, Dig. b. 1. lix. &c. The authority for reducing the accumulated debt in such case to a fourth part, has not been found. C.

Menu is wrongly interpreted; and, from what Shaster the law of the latter part of the opinion is taken, it would be vain to inquire. The Plaintiff was entitled to recover the full amount of the debt, and interest not exceeding that amount. E.

ZILLA OF CHINGLEPUT.

Oct. 26, 1802.

S. Ramanjummall, *v.* Permall Naikin.

(Ante, vol. ii. p. 301.)

The Defendant became security to the Plaintiff for a sum of money borrowed by one Aude Naikin deceased, payable on demand. No demand was ever made on Aude Naikin during his life. Is the money recoverable of the surety?

Answer.

It is not, unless he have property in his hands belonging to the estate of Aude Naikin.

(Signed) T. Kistnama Chariar.

Remarks.

The decease of the debtor does not exonerate the surety, unless indeed he was merely surety for appearance; which does not seem to have been the case in the present instance. C.

If he have money belonging to the estate, he becomes liable, not as surety, but as receiver of the property; *vic tha gruhah.* E.

BOMBAY.

May 27, 1811.

(Ante, vol. i. p. 301.)

If money be borrowed by one on the security of another, and the borrower residing out of the jurisdiction, the surety dies, can the debt be recovered against the son of the surety?

Answer.

The son of a surety for the *appearance* of another, is not liable for his father's undertaking; but the son of a surety for the *debt* must pay it, in default of the borrower; with this distinction, that the father is liable for interest, the son for the principal only.

(Signed) VISTRUE PANDOORUNG.

Remarks.

See Jagannatha's Digest, b. 1. cxliv. and clxii—clviii. C.

This is the law. E.

ZILLA OF BELLARI.

Nov. 17, 1807.

Samy Kesogee, *v*. Gooty Curnum Appiah.

(Ante, vol. i. p. 308.)

In 1798, the Defendant's father executed a writing for fifty rupees, payable in a month, and lived till 1802, without any demand having been made upon him for payment. The son, on this ground, resists the demand now made.

Answer.

The father who borrowed the money being dead, the son should pay it; a father's desire for a son being, among other considerations, with a view to his discharging his debts. Having been contracted within ten years, it is payable by him in the present instance.

Remarks.

Certainly ten years is the shortest limit of action known to the Hindu law. See Yajnyawalcya, cited by Jagannatha, b. i. 113. C.

To the same effect by E.

BOMBAY.

(Ante, vol. i. p. 311.)

An acknowledgment of a debt in writing having been attested by one witness only, and the debtor denying his signature, can it be proved by the only attesting witness?

Answer.

If both parties have consented to abide by the evidence of one witness only, he may be received; but should either party object, his single testimony is inadmissible.

Remarks.

Yajnyawalcya authorizes the admission of a single witness, by consent of both parties. (Book ii. ch. iv. v. 5.) But Menu and Vyasa authorize it without this restriction. See Menu, ch. viii. v. 77. Vyasa's words are, " a witness " who is unimpeachable as to his conduct, and acquainted " with his duties, and whose speech is conformable with " facts, shall be sufficient, though single, especially in the " case of violent crimes." The author of the *Virametrodaya* cites that passage in proof of the position, that " one " who is recognized by the king and the caste, as a just " and sensible man, may be singly a witness." C.

The best procurable evidence is, at the discretion of the judge, in all cases admissible. The consent of the parties gives it no additional validity. The admission of a single witness by consent, where the law without it

requires a plurality, applies to cases where doubts are to be cleared, not facts to be ascertained. As, where it is doubted whether the custom of *Stri-bhaga* exists in a certain caste;—a single instance cannot establish a custom; it requires many witnesses to prove it: many, perhaps, cannot be adduced; but there is a single person who happens to be well acquainted with the customs of the caste; he may be admitted, not to prove the custom —to that he is incompetent—but to clear the doubt. This, however, does not in any way apply to the case of a single attesting witness. If his credit be good, a single witness is as competent as twenty, to prove the fact of the instrument in question having been given by the Defendant. Three witnesses are mentioned in some texts as being proper, not necessary; and even the propriety is by some confined to cases where the contract is verbal, not written. E.

ZILLA OF VERDACHELLUM.

January 6, 1809.

P. Chedumbra Pillay, *v.* Conda Pillay.

(Ante, vol. i. p. 311.)

The parties are cousins, between whom no division has taken place. Cooteya Pillay, the fraternal nephew of the Plaintiff, himself entitled to a share of the property in dispute, being called as a witness on the part of the Plaintiff, is he competent?

Answer.

Cooteya Pillay, being himself a parcener, is not examinable as a witness on the part of the Plaintiff.

Remarks.

Those must not be admitted who have an interest in the matter. See Menu, ch. viii. v. 64. C.

The law says, and the authorities are many, that, in cases of partition, the evidence of kinsmen is not only admissible, but preferable. In all cases, however, evidence must be regulated by discretion; and, notwithstanding, therefore, the preference given by the law to kinsmen, in cases of partition, the judge ought to reject doubtful, corrupt, or manifestly partial evidence. But, in the present case, putting the two first out of considera-

tion, what cause was there to fear, that the circumstance of Cooteya Pillay being a parcener, would induce him to give partial evidence in favour of the Plaintiff? The contrary is the natural inference; for there is ground to fear that he might be induced to give partial evidence against him, from motives of personal interest; for, if the Plaintiff be admitted to a share of the estate, Cooteya's must be proportionably reduced. Neither in law, therefore, nor reason, are there any grounds for rejecting his evidence. E.

ZILLA OF VERDACHELLUM.

C. Sashiah, *v.* P. Veneata Soobyah

(Ante, vol. i. p. 311.)

Veneata Lachemy Honmall, a witness on the part of the Defendant, (a Brahminy woman,) having lost her husband about a year ago, has since got her head shaved; upon which it is objected, that she cannot appear before the Court.—Qu. Is this so?

Answer.

According to the custom of the country, the woman in question cannot appear before the Court to give evidence.

Remark.

The appearance of the woman, under the circumstances stated, would not, according to the custom of the country, be decent. But why not depute an agent to examine her, as allowed in such cases by the regulations?

E.

ZILLA OF BELLARI.

April 7, 1810.

Gheriuppah, *v.* Sasachallum.

(Ante, vol. i. p. 311.)

To the Pundit.

The point at issue in this case being involved in great obscurity, you are directed to say whether, in such a case, the Shaster authorizes the judge to administer an oath to the parties for the discovery of the fact; and what is the most solemn form of administering it to these parties, who are of the goldsmith caste?

Answer.

The judge has a discretion in such a case; and the goldsmiths being descended from *Visvakurma*, oaths must be administered to them in the presence of the goddess *Cali*. They are taken by them fasting, having a red cloth, wetted, thrown over them, with a vermilion mark on their forehead, and a wreath of flowers round their necks: at the same time extinguishing the light, which is kept burning in the Pagoda.

(Signed) RUNGACHARY, *Pundit.*

Remarks.

The answer seems to allow too great a latitude for administering an oath to a party, which, in fact, is ordeal.

Catyayana says, "Supernatural proof is not required, if "witnesses be forthcoming; nor shall trial by ordeal, nor "by oral evidence take plaee, in cases where written "documents exist. But, when the evidence of witnesses "is equally balanced, let the truth be cleared by (oath or) "ordeal."—Vyasa also declares, "Ordeal, though ad-"ministered in due form, may contradict the truth "through the power of charms, incantations, and drugs: "not so an honest witness."

The author of the *Virametrodaga*, following the Mitacshara, observes, that "Oaths, as ascertaining the fact "only upon failure of human means of proof, fall within "the definition of ordeal; but are discriminated, because "the instantaneous ascertainment of the truth constitutes "ordeal; whereas oaths are the means of discovering it "by an event subsequent."—Nareda (i. v. 103.) authorizes this recourse, only in default of all other means of determining the fact. "If presumptive evidence be "insufficient, let the judge make the accused undergo "an oath administered on fire, or on water, or on the "merits of good actions, or in some other mode, accord-"ing to the value in dispute, the time, or season, and the "strength of the party." See also a material passage of Menu, ch. viii. v. 109. C.

Oaths may no doubt be legally administered to either party in a suit, but not to both, as the Judge's reference seems to imply. The opinion is correct. E.

ZILLA OF VERDACHELLUM.

January 23, 1807.

(Ante, vol. i. p. 311.)

Of the three sons of the deceased, the two younger who were absent from home at his death, returning a few years after, and demanding a division of the estate, the elder denies being in possession of any; upon which this suit is instituted.—What evidence, according to the Hindu law, is required to prove the estate of the deceased to be in the hands of the elder brother?

Answer.

In the thirteenth division of the Smriti Chandrica, called *Daya baghum*, it is held that when a concealment, such as is implied in the case, exists, the test of a solemn oath from the party is to be resorted to, by means of holy water, called *cosha*.

Remarks.

The passage to which reference is here made, contains a quotation from Catyayana, which occurs in Jagannatha's Digest, (book v. ver. 374.) and a correspondent text of Vrihaspati. C.

The administration of an oath would be proper, but whether it ought to be the *cosha*, or the *visha pramanam*, or any other, it may be questioned if the Pundit referred to was competent to determine. E.

ZILLA OF VERDACHELLUM.

June 18, 1807.

Tondavaroyall, *v.* Veneatanarnian.

(Ante, vol. i. p. 311.)

The Plaintiff, alleging that he had deposited his paddy (rice) in the house of Patchia Gounden, and that the Defendant had taken and disposed of it, produces Patchia Gounden as a witness. It is objected, that Patchia Gounden has been at variance with the Defendant for these fourteen years, having filed no fewer than four plaints in this Court against him. It is objected to the production by him of another witness, named Santa Pillay, that he was removed from his situation of accountant, upon the Defendant discovering to the Honourable Company his fraudulent conduct toward them; and, of course, that he must be prejudiced. And to a third, named Tondavaroy Moodely, both partiality and prejudice are objected. It is referred to you, the Pundit, to say, how far such witnesses are admissible.

Answer.

The seizure and disposal of the paddy having been by force, if the witnesses in question are the only ones to be had, their evidence may be taken, otherwise they are inadmissible.

(Signed)

Remarks.

A professed enemy is no witness. Nareda, 1. 5. 39. Menu, ch. viii. 64. No more is a known offender, *ibid.* According to Catyayana, they who subsist by the earnings of the party, or perform service for him, or are his kinsmen, or his intimate friends, or partisans, are not in general admissible as witnesses in his cause. Nevertheless, it is laid down by Menu, (ch. viii. v. 72.) that, in cases of violence, the judge must not examine too strictly the competence of witnesses. C.

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THE END.

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